FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

sec 1235

# No. 1211

JAMES M. CURLEY

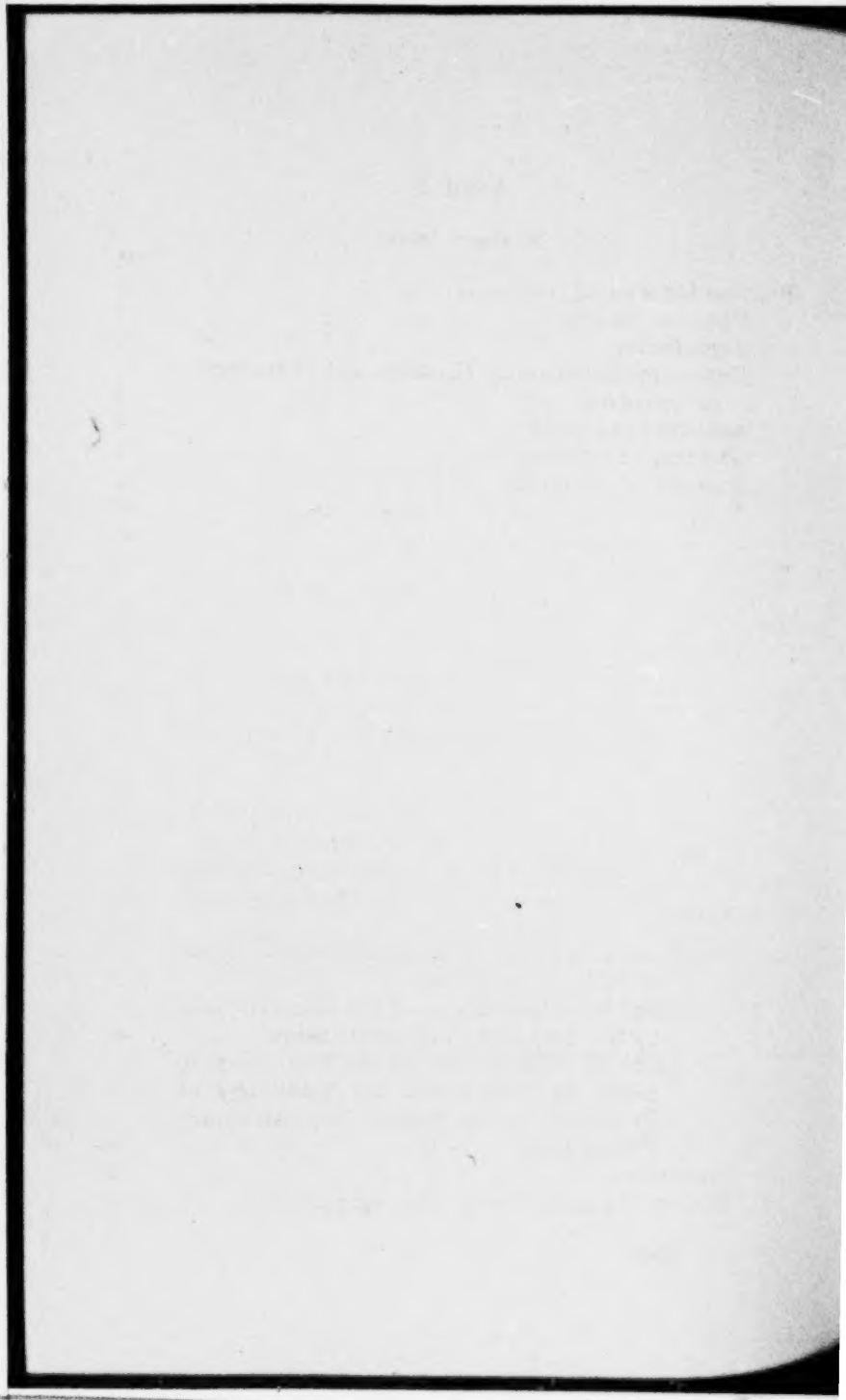
*Petitioner,*

*v.*

THE UNITED STATES OF AMERICA

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, BRIEF IN SUPPORT THEREOF AND MOTION TO DISPENSE WITH PRINTING RECORD.**

William E. Leahy,
Nicholas J. Chase,
*Attorneys for Petitioner.*



# INDEX

## Subject Index

## TABLE OF CASES

STATUTES AND OTHER AUTHORITIES

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1946

## No. 1211

JAMES M. CURLEY

*Petitioner,*

*v.*

THE UNITED STATES OF AMERICA

## PETITION FOR WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS

James M. Curley, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia (App. 80)[1], affirming the judgment of the United States District Court for the District of Columbia convicting him of conspiracy

[1] The "App." designation refers to the Appendix to this Petition and Brief which is printed as a separate document. The Record was not printed in the Court Below (see Rule 39, Federal Rules of Criminal Procedure) and Motion was duly filed in this Court seeking leave to dispense with the printing of the Record on Petition for Certiorari. This Motion is printed as an addendum to this Petition and Brief. The portions of the Record material to the consideration of the questions herein presented are set out in the Appendix. References to the original Record bear the designation "R."

under 18 U. S. C. A., Section 88, (C. C., Sec. 37), to commit offenses against the United States [violating 18 U. S. C. A., Sec. 338, (C. C. Sec. 215)] and of nine substantive counts charging the use of the mails to defraud. [18 U. S. C. A. Sec. 338, (C. C. Sec. 215)]

Petitioner was given a general sentence of six to eighteen months imprisonment and fined $1,000. (R. 3902) (App. 96) After imposing sentence the District Court stated in open Court:

> "Frankly, I want an appeal in this case. I have told counsel, though I have acted to the best of my judgment and ability, I appreciate the fact that there are some rulings as to which other men may differ; and in view of that, *I much prefer* that other jurists as competent or more so than myself *take this record and pass upon it before the defendants actually suffer* any punishment I have imposed." (R. 3903) (App. 97) (Italics supplied)

## Opinions Below

The District Court issued no formal opinion as to the questions herein presented, but there are set forth in the Appendix excerpts from the transcript of testimony embodying statements made by the District Court which directly relate to the questions presented. The Court Below, in affirming the judgment, was divided in its opinion, (App. 53) Justices Prettyman and Edgerton constituting the majority and Justice Wilbur K. Miller filing a dissent. (App. 71) The majority and dissenting opinions are not as yet reported.

## Jurisdiction

This cause was argued in the Court Below on June 6, 1946. The opinion and judgment of the United States Court of Appeals for the District of Columbia were entered

January 13, 1947. (App. 80) Petition for Rehearing was denied February 4, 1947. (App. 81) On February 27, 1947, the Chief Justice of the United States extended the time within which to file this Petition to and including April 5, 1947. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 11 and 13 of the Rules of Practice on Procedure in Criminal Cases promulgated by this Court on May 7, 1934 and Rule 37 of the Rules of Criminal Procedure for Federal Courts. The questions herein presented were clearly raised in the District Court and in the Court of Appeals.

The Petition for Rehearing in the Court Below was addressed individually to the justices of that Court who did not participate in the decision below, as well as to the original panel. This action was taken in view of what appears to be a clear conflict of opinion on the questions presented in the Court below. This conflict is emphasized in the minority opinion (App. 75), as well as in the majority opinion wherein references were made to the opinion of Justice Harold M. Stephens in *United States* v. *United States Gypsum Co.*, 51 F. Supp. 613, 628-633. Authorities relied upon to support petitioner's application seeking the vote of all members of the Court on the Petition for Rehearing were:

*United States ex rel Robinson* v. *Johnston, Warden*, 316 U. S. 649; 62 S. Ct. 1301; 86 L. Ed. 1732;
*Textile Mills Securities Corp.* v. *Commissioners*, 314 U. S. 326; 62 S. Ct. 272; 86 L. Ed. 249;
*Crutchfield* v. *United States*, 142 F. (2d) 170-180.
28 U. S. C. A. 212 et seq: Judicial Code Sec. 117 et seq.

The non-members of the original panel took no action whatsoever on the Petition for Rehearing and it was denied without opinion by the original panel.

## Summary Statement of the Facts and of the Matter Involved

The petitioner is one of seven defendants who were indicted on January 3, 1944, charged in fifteen substantive counts with using the mails in a scheme to defraud (18 U. S. C. A. 338) and a conspiracy count (18 U. S. C. A. 88) charging each with a conspiracy to do the same. (App. 1-52) Each substantive count alleged the same fraudulent scheme and the mailing of different letters was made the basis of each count. The Petitioner was found guilty on nine substantive counts, Counts 1 to 9, inclusive, which roughly overlapped in point of time the period during which Petitioner was President of Engineers' Group. While the evidence failed to disclose any knowledge or participation by the Petitioner in the fraud surrounding the transaction constituting the basis of each of the said substantive counts, the Court Below concluded that, the Petitioner having been found to be a participant in the conspiracy (Count 16) was guilty under the substantive counts for all acts committed by another conspirator pursuant to the conspiracy under the law as announced by this Court in *Pinkerton* v. *United States*, U. S. Sup. Ct., June 10, 1946, 14 U. S. L. Wk. 4456. (App. 88), The District Court reached the same conclusion. (R. 3889-3890) In the light of the position taken by the Courts Below, Petitioner feels that the only count with which we need concern ourselves in this Court is the conspiracy count. This would seem to follow from the action of the Court of Appeals with respect to the evidence surrounding the substantive counts and to be the logical conclusion to be drawn as a result of the application of the *Pinkerton* doctrine.

## Statement of Facts

Briefly, the fraudulent scheme allegedly revolved around an organization known as Engineers' Group which began activities in June or July, 1941. The Group was organized

by one James G. Fuller who had just been released from the District of Columbia Jail where he had served time for fraudulent crimes. Fuller had a long criminal record and since his admission to bail by the Court Below in the instant cause has been arrested again for fraudulent crimes and is presently confined in a Federal detention unit in New York City. (See Hearings of Special United States Senate Committee Investigating The National Defense Program, 77th Cong., 1st. Session, popularly known as The Truman Committee, Part 12, pages 5353-5356)

Petitioner was introduced to Fuller in the Mayflower Hotel in midsummer, 1941 and had no knowledge of the commercial crime proclivities of Fuller and there is no evidence that Petitioner or the other principals identified with the Group knew of Fuller's crooked enterprises or activities. Prominent figures in American industry were identified by Fuller with the Group either with or without their knowledge or approval. Engineers' Group was later incorporated. (It was not indicted.) The Group was formed to aid contractors in connection with the negotiation and execution of contracts for housing construction and later branched out to include contracts for the production of war material. The Group was held out as able to furnish services incident to the negotiation and execution of such contracts and the furnishing of engineering and similar services. Fuller negotiated the contracts with the various concerns doing business with the Group and was the spearhead of all Group activities. He collected various sums of money from manufacturing concerns and executed in Washington various agreements under which the sums collected would be refunded if contemplated business projects did not materialize. He made representations in the name of the Group as to business controlled by it, its staff, its assets and the existing status of various projects.

Without going into detail here, the majority opinion of the Court Below may be said to represent the facts for the purposes of this petition. (App. 53-71) Petitioner submits that the Record supports the conclusions of the Courts Below that Petitioner neither had actual connection with nor actual knowledge of the misrepresentations made. Petitioner's *criminal* responsibility, viewing the evidence most favorably to the Government, was predicated principally upon the following facts: He was President of the Group from June 26, 1941 until his resignation in December, 1941. While in Boston, he referred three contractors to Fuller, identifying himself as affiliated with the Group and stating that Fuller was the man to see in connection with the procurement of construction work. Petitioner was also shown in July, 1941, to have personally discussed in a telephone conversation with a bank official the matter of a loan to the Group which was to be left on deposit. The bank official testified that a loan of this nature was not an unusual one nor contrary to good banking principles at the time because "up until the Government made a change of conditions of securing a Government contract, we had probably six or seven applications of loans of that type." (R. 2081, 2082) In any event, upon refusal by the bank official the matter was dropped by petitioner No other attempt to secure such a loan was made by petitioner. The only other evidence against petitioner related to his having been seen in the Group office in Washington, D. C.

The majority and minority in the Court Below were in agreement that the foregoing facts were the only circumstances inculpating petitioner, save and except that the majority would ascribe to petitioner *criminal* responsibility for the reason that—

> ". . . total misrepresentation of the corporate affairs and total diversion of funds is substantial ground for

an inference of knowledge on the part of an *active* and *experienced* president." (App. 67) (Italics supplied)

The record is barren of any circumstance to justify the conclusion that petitioner was either active or experienced in the Group affairs. The contrary is clearly reflected in the record which is uncontradicted in its showing that petitioner was totally unaware of Group activities and, more particularly, the activities of Fuller. The record is clear that petitioner was engaged in a hotly contested election for the mayoralty of Boston, and a recount on his challenge of the result, from early Fall, 1941, until a time contemporaneous with his resignation from the Group in December, 1941.

In connection with this petition and brief on certiorari, it is not necessary to labor the facts further.

## The Matter Involved

At the conclusion of the case for the prosecution, petitioner moved for a directed verdict (motion for judgment of acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure). (R. 2868-3022; 2966-3005; 3105-3127) The motion was denied (R. 3140). The District Court announced that—

> "I think, in view of the fact that the case must continue, it is most appropriate that I should not elaborate upon the evidence or upon my reasons for the conclusions which I have just announced. (R. 3142) (App. 87)

Petitioner stood on the motion and offered no evidence. On the argument of the motion, petitioner maintained that the evidence was insufficient to make out a cause of action, i.e., that there was a complete lack of *legal* proof and that, therefore, a case had not been made out for the jury. Discussions with the Court ensued wherein petitioner maintained that the Court was governed on the motion by the

law as declared in *Hammond* v. *United States*, 75 U. S. App. D. C. 397, 127 F. (2d) 752 (1942), particularly the language thereof reading:

> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him."

The District Court flatly announced that the foregoing was not a correct statement of the law on the motion. (App. 83) When reference was made to *Cady* v. *United States*, 54 App. D. C. 10, 293 Fed. 829 (1923), which contains the same statement of legal principles, the Court stated that it was

> "a decision or a quotation . . . that I am not bound by. I think it is a wrong statement of the law. (R. 2931-2932) (App. 83)

Referring again to the *Hammond* case, the Court remarked:

> "we can agree that it (the rule) was not what the Court says it is in this decision." (R. 2941)

The Trial Court further stated:

> "I have not said, of course, whether I thought the evidence was sufficient to justify a conclusion that any defendant was guilty beyond a reasonable doubt. I have not said either way. I denied motions to direct verdicts; that is all I did." (R. 3857-3858) (App. 87)
>
> "It is unusual for me to judge of the guilt or innocence of men who are tried before me and are convicted. That is the function of the jury, and I do not belabor my mind with attempting to judge my fellow man unless it is necessary—certainly not to condemn, unless the duty falls upon me." (R. 3901 (App. 96)

On the motion for new trial (App. 87) and on the imposition of sentence, the Trial Court maintained the same position, stating, however, that he was desirous of appellate review. (R. 3903) (App. 97) The point was assigned as error and briefed in the Court Below.

Several other errors were assigned and briefed in the Court Below, but it is felt that the certiorari function would not encompass them and for that reason only one other question presented in the Trial Court is urged here, namely, the failure of the Trial Court to limit the admissibility of the evidence relating to the receipt by petitioner of $3,500 from Fuller. See Point VI infra).

In addition to the questions presented as a result of rulings of law by the Trial Court, there is presented a question raised necessarily in the Court of Appeals, namely, the function of the Appellate Court in reviewing a judgment of conviction. This question arises from the refusal of the Court Below to follow the rule of law set forth in the *Hammond* case, *supra*,—

> "and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him."

It will be seen that the majority in the Court Below completely eliminate and abolish the long established appellate function with relation to the review of evidence for sufficiency. (App. 68) Under the rule announced by the majority, the only function of the appellate court will be to determine whether on the Government's evidence a reasonable mind *might* find guilt beyond a reasonable doubt *vel non*. If the appellate court finds that the evidence *might* lead to either conclusion, then the case is always for the jury. An appellate court will no longer look at the record to determine whether "all the substantial evidence is as consistent with innocence as with guilt."

## Questions Presented

The majority in the Court below concluded that—

> "The decision in the case rests squarely upon the rule of law governing the action of the trial judge upon the motion for directed verdict of acquittal and the action of an appellate court upon a verdict of conviction." (App. 68).

I

What is the law which controls the trial judge in a criminal case in a Federal Court on a motion for directed verdict of acquittal made at the close of the Government's case? The proof is assumed by the trial court to be true for the purposes of the motion. Was the Court Below, therefore, correct in holding that if upon such evidence the trial judge "concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter"? (App. 58) Petitioner maintains this is error for the reason that *preliminarily* the question of proof of guilt beyond a reasonable doubt *vel non* is a matter of law to be resolved by the Court. When, applying the rule of reason, the Court finds on the admitted proof that either of the two conclusions is "fairly possible" (App. 58) then in the light of the *legal* presumption of innocence and the *rule of law* placing the burden upon the prosecution to establish guilt beyond a reasonable doubt, the trial court must as a matter of law conclude that there is a reasonable doubt of guilt and cannot send the case to a jury. The fixed principles of the law preclude any jury function in such a situation.

II

What is meant by the language: "*substantial evidence* of facts which exclude every other hypothesis but that of

guilt"? *Hammond* v. *United States*, 75 U. S. App. D. C. 397, 127 F. (2d) 752 (1942).

III

Whether the Court below applied improper standards, as an appellate court, in reviewing and affirming the action of the District Court who stated that he had never drawn conclusions, either on the motion for directed verdict of acquittal or on the motion for new trial, as to whether he "thought the evidence was sufficient to justify a conclusion that (the) defendant was guilty beyond a reasonable doubt" (R. 3857-3858).

IV

The Court below held that the appellate function is limited, insofar as the legal sufficiency of the evidence adduced by the Government is involved, to determining whether a reasonable mind *might* find guilt beyond a reasonable doubt *vel non*. The former rule which provides that "where all the *substantial* evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse" has been overruled. It is no longer necessary for the appellate court to find "that a jury of reasonable men could have fairly reached the conclusion that (defendant), in what he did, *necessarily* intended to commit the crime." *Hammond* v. *United States, supra.* Is the Court below correct on this vital matter, particularly in the light of the presumption of innocence?

V

Whether the Court below erred in affirming the action of the District Court in denying petitioner's requests for instructions to the jury limiting the purpose and scope of the testimony of petitioner in the Boston supplementary proceedings. Point VI, *infra.*

**Reasons for Allowance of the Writ**

I. The decision of the Court below is in direct conflict with the decisions of at least four Circuit Courts of Appeal. The Court below stated that—

> "It is only fair to say that the view which we take is perhaps at variance with the views which have been taken by some of the Circuit Courts of Appeal" (App. 64) (Citing cases).

We find no precedent in the federal or state systems which is in accord with the decision below. On the other hand the rule—"Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused . . ."—is declared to be the law in the following Circuits and heretofore in the District of Columbia:

*Decisions of Circuits*

2nd:

*Nosowitz* v. *U. S.*, 282 F. 575 (1922);
*Romano* v. *U. S.*, 9 F. (2d) 522 (1926).

3rd:

*Grant* v. *U. S.*, 49 F. (2d) 118 (1931);
*Ridenour* v. *U. S.*, 14 F. (2d) 888 (1926);
*McLaughlin* v. *U. S.*, 26 F. (2d) 1 (1928);
*Graceffo* v. *U. S.*, 46 F. (2d) 852 (1931);
*Nicola* v. *U. S.*, 72 F. (2d) 780 (1934);
*Paul* v. *U. S.*, 79 F. (2d) 961 (1935).

8th:

*Read* v. *U. S.*, 42 F. (2d) 636 (1930);
*Danaher* v. *U. S.*, 39 F. (2d) 325 (1930);

*Gargotta* v. *U. S.*, 77 F. (2d) 977 (1935);
*Salinger* v. *U. S.*, 23 F. (2d) 48 (1928);
*Tinsley* v. *U. S.*, 43 F. (2d) 890 (1930).

10th:

*Bishop* v. *U. S.*, 16 F. (2d) 410 Mod. 19 F. (2d) 224 (1927);
*West* v. *U. S.*, 68 F. (2d) 96 (1934);
*Leslie* v. *U. S.*, 43 F. (2d) — (1930);
*Isbell* v. *U. S.*, 227 F. 788, 142 C. C. A. 312 (1915);
*Sullivan* v. *U. S.*, 283 F. 865 (1922);
*Moore* v *U. S.*, 56 F. (2d) 794 (1932);
*Parnell* v. *U. S.*, 64 F. (2d) 324 (1933).

U. S. Court of Appeals, District of Columbia:

*Cady* v. *U. S.*, 293 F. 829, 54 App. D. C. 10 (1923);
*Hammond* v. *U. S.*, 127 F. (2d) 752, 75 U. S. App. D. C. 397 (1942).

II. The decision of the Court below is in direct conflict with the decisions of the Circuit Court of Appeal with respect to the appellate function on review of evidence in the record of a criminal cause in a federal court. The rule in *Hammond* v. *United States*, 75 U. S. App. D. C. 397, 127 F. (2d) 752 (1942) that "where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the Appellate Court to reverse a judgment against him" is universally followed in all ten Circuit Courts of Appeal and was the law in the District of Columbia until the instant decision was announced. All of the citations set out under paragraph I hereof are equally applicable on this question. Under the law as declared by the Court below the appellate function is now limited to determining whether on the motion for directed verdict the trial court correctly concluded

that there was substantial evidence from which a jury might conclude guilt beyond a reasonable doubt *vel non.*

III. This Honorable Court has never decided the questions herein presented. The decisions of this Court and the legal literature relating to the subject fail to disclose any precedent or pronouncement by this Court. Cases which may be relied on by the Government such as *Pierce* v. *United States,* 252 U. S. 239, 64 L. Ed. 542, 40 S. Ct. 205 (1920) (see other authorities in footnote 8 of majority opinion in Court below, App. 60) are beside the point and beg the very questions herein involved. The *Pierce* and related cases hold that there was substantial evidence of guilt to sustain the verdicts in those cases. The questions herein raised were neither urged nor discussed.

These are important questions of federal law which should be settled by this Court. The questions go to the very essence of a criminal trial and their resolution will vitally affect the administration of justice in criminal causes throughout the federal system. What is the duty of the Federal District Judge on the motion for directed verdict in a criminal case? Must the Government in its case, the truth of which must be assumed by the Court, foreclose a reasonable hypothesis of innocence in order to overcome the legal presumption of innocence and thereby prove guilt beyond a reasonable doubt? These and correlated questions inhere in the present cause and should be resolved in order that equal justice may be meted out here and in the thousands of criminal prosecutions which are to come on for hearing throughout the federal system.

IV. Rule 29 of the new Federal Rules of Criminal Procedure provides that the Court shall order the entry of judgment of acquittal ". . . after the evidence *on either side* is closed *if the evidence is insufficient* to sustain a conviction of such offense or offenses." How can the evidence be said

to be sufficient "at the close of the evidence offered by the Government" (Rule 29) if the *admitted* proof is such as to permit either a conclusion of innocence or a conclusion of guilt beyond a reasonable doubt?

We respecfully submit that the reasons herein advanced meet the certiorari standards of this Court.

## Conclusion

It is respectfully submitted that the Petition should be granted.

WILLIAM E. LEAHY,
NICHOLAS J. CHASE,
*Attorneys for Petitioner.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

---

# No. 1211

---

JAMES M. CURLEY,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

---

## BRIEF IN SUPPORT OF PETITION

---

### Summary of Argument Directed to the Theory of the Majority Opinion

I

Obviously the crux of the case and the questions on which the split of opinion arises are the rules of law by which the trial judge determines the proper action on the motion for directed verdict and the duty of the appellate court upon a verdict of conviction. Running through most of the authorities is the basic statement in *Isbell* v. *United States*, 227 Fed. 788, 792 (C. C. A. 8th, 1945) "unless there is *substantial evidence* of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to

instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him." This statement in the *Isbell* case is the law in *all* federal courts and until now was determinative of this aspect of the law. Essentially it seems to mean that unless the substantial evidence as to the facts excludes every other reasonable hypothesis save that of guilt, i. e., if there is also a reasonable hypothesis of innocence, a balance between innocence and guilt, or even a question of innocence with the guilt, the motion will be sustained, and in the case of the appellate court, where all the substantial evidence is as consistent with guilt, the appellate court must decide for the defendant. This presents the point of balance between guilt and innocence as far as interpretation goes.

In the present case the Court below does not overthrow the *Hammond* case (based on the parent case, the *Isbell* case) but claims the *interpretation* of that case is not correct. The approach of the Court below poses a series of questions that must be answered:

1. Upon what authorities does the Court below base its different interpretation?

2. What is this "substantial evidence" required to exclude every hypothesis but that of guilt?

3. What really is the function of the judge on the motion for a directed verdict?

4. What is the function of judge and jury in determining a reasonable doubt "*vel non*"?

After a discussion of the relation of the judge and jury, the Court below states that the function of the trial judge in passing on a motion for a directed verdict is to determine

whether upon the evidence, giving full play to the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact, *a reasonable mind might fairly* conclude guilt beyond a reasonable doubt. Thus, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. The essential, basic change the Court below is now making in the *Hammond* case is that it is no longer necessary for the Government's proof to foreclose the hypothesis of innocence, for to say that "a reasonable mind *might* fairly conclude guilt beyond a reasonable doubt", as the majority state it, permits the jury to *speculate* on the guilt of the accused, even though the *substantial* evidence is as consistent with guilt as with innocence. In other words, it is the jury's function to determine reasonable doubt *vel non*, that is, it is the jury's function provided the evidence is such as to permit a reasonable mind fairly to reach either of the two conclusions. Then the majority quickly and briefly state "we do not in any way impinge upon the presumption of innocence". We respectfully submit, as maintained by the strong dissent in this case, that this *does* destroy the presumption of innocence and permits *speculation* by the jury as to the guilt or innocence of the accused. See *Coffin* v. *U. S.*, 156 U. S. 432, 459, 460, 15 S. Ct. 394, 39 L. Ed. 481; *Holt* v. *U. S.*, 218 U. S. 245, 253, 31 S. Ct. 2, 54 L. Ed. 1021; *Agnew* v. *U. S.*, 165 U. S. 36, 51, 17 S. Ct. 235, 41 L. Ed. 624; *Miklencic* v. *U. S.*, 62 F. (2d) 1044; *Dodson* v. *U. S.*, 23 F. (2d) 401. The Court below claims that this is satisfactory as an instruction to the jury, but should not govern the judge. This is a fallacy, and so is the Court's statement on Page 5 of the opinion that the normal interpretation of the *Hammond* (ne *Isbell*) rule would mean that the judge would have to be convinced of guilt beyond a peradventure of a doubt before the jury would be per-

mitted to consider the case. This second fallacy shows an inadequate examination of the *Isbell* case.

As a careful reading of the *Isbell* case will show, "if there is, at the conclusion of the trial no substantial evidence of facts which exclude every other hypothesis but that of guilt, there is no substantial evidence of the guilt of the accused, *for facts consistent with his innocence are never evidence of his guilt*". "This does not require the judge to pass on the weight of the evidence, credibility of the witnesses or direct an acquittal unless he believes the defendant guilty beyond a reasonable doubt" . . . "his duty is to determine whether there is any substantial evidence against the defendant . . . if none . . . direct a verdict". What then is this substantial evidence? One thing we know it *cannot* be,—and that is facts as consistent with innocence as with guilt, for, as the *Isbell* case states, they are not evidence of his guilt. If we examine the evidence against petitioner, all circumstantial, we see that it is as consistent with his innocence as with his guilt. At the trial the jury was permitted, therefore, to *speculate* as to whether these *facts* were evidence of *guilt* or *innocence*, rather than taking *the facts on his guilt*, as they would have done if the guilty facts were present, and determine whether he was guilty beyond a reasonable doubt. This last statement emphasizes the fallacy in the reasoning of the trial court and that of the Court below.

## II

Again, the Court below erred in its appraisal of the *Isbell* case for while where there is *substantial* evidence inconsistent with the innocence of the accused, the case must go to the jury; however, as has been pointed out, facts as consistent with innocence as with guilt are not *substantial* evidence of guilt beyond a reasonable doubt. Thus, where all the substantial evidence was as consistent with

guilt as with innocence, it was the duty of the Court below to reverse the judgment against petitioner. The majority opinion in the Court below is *identical* with the dissent in the *Isbell* case, and it was disposed of there. Now two judges in the Court below would attempt to revive it. In this connection see the dissenting opinion below (App. 71). See also Rule 29 of the Federal Rules of Criminal Procedure.

III

In the eyes of the law, the accused is presumed innocent and the presumption remains until his guilt is proved beyond a reasonable doubt, the burden being on the Government. On a motion for judgment of acquittal at the close of the Government's case, the sufficiency of the evidence is tested by the *legal* determination of reasonable doubt. The question before the trial judge is one of law and he must determine reasonable doubt *vel non*. A reasonable doubt exists when at the close of the Government's case, the substantial evidence of facts are not inconsistent with innocence. A reasonable hypothesis of innocence existing, there is a reasonable doubt, and, therefore, the presumption of innocence is not overcome by proof of guilt beyond a reasonable doubt. The Government has not made out a *prima facie* case and has not met its burden. The motion raises a question of law, namely, the sufficiency of the evidence. Where the substantial evidence of the facts does not exclude every hypothesis except that of guilt, the evidence is not inconsistent with a hypothesis of innocence and a reasonable mind must find a reasonable doubt. This is the standard for the judge and he must find as a matter of law that there is a reasonable doubt and direct a verdict.

A judge may conclude that from the evidence either of the two results, a reasonable doubt or no reasonable doubt, is fairly present but because of such conclusion he may not

further conclude that he must let the jury decide the matter. He is deciding a question of law of which this determination of reasonable doubt is a part. Applying the rule of reason to the degree of proof required by the law, he must conclude that either result being possible, every hypothesis except guilt has not been excluded and there is a reasonable doubt. It is true, that if permitted to go to the jury, they might find either way. But the law has foreclosed that possibility by ordaining that where a reasonable doubt might fairly be found upon the evidence, the government has not met its burden of proving guilt beyond a reasonable doubt and the presumption of innocence is not overcome. The defendant is still presumed innocent by the law and the jury may not speculate as to his guilt, and therefore, the jury must be directed to return a verdict of not guilty. To allow the jury to decide would be a substitution of its decision for one already made by the law.

The majority opinion states, "The critical point in this boundary (province of the jury) is the existence or nonexistence of a reasonable doubt as to guilt." On the motion, the issue of law is whether *as a matter of law* a reasonable doubt exists. In ruling on the motion, the judge must as a preliminary matter of law determine the existence or non-existence of reasonable doubt. When, assuming the truth of the government's evidence, guilt is not the only reasonable hypothesis, the burden of proving guilt beyond a reasonable doubt has not been met and the presumption of innocence remains. On the motion, unless guilt is the only hypothesis, it follows that a reasonable mind might possibly have a reasonable doubt or might possibly have no reasonable doubt. But the law does not permit the latter possibility. The law says that unless guilt is the only hypothesis, guilt has not been proved beyond a reasonable doubt, there is nothing for the jury to decide and as a matter of law there is a reasonable doubt.

## IV

(a) The proven facts, *arguendo,* in this case equally support an inference of guilt and an inference of innocence, in other words, the facts are as consistent with the innocence of the accused as with his guilt. Thus we have the situation where from the same set of circumstances the jury could infer either guilt or innocence.

However, in a criminal case there is the basic presumption of the innocence of the accused. Therefore, there cannot be a question of reasonable doubt when all the proven facts are as consistent with guilt as with innocence. As Justice Miller says in his dissent, "The inference of guilt from circumstantial evidence is never justifiable when the proven facts at least equally well permit innocence to be inferred." In other words, circumstantial evidence cannot overturn the presumption of innocence that remains with the accused when the circumstantial evidence is as consistent with innocence as with guilt.

As the *Chamberlain* case (288 U. S. 333, 339) says, "Where proven facts give equal support to each of two inconsistent inferences; in which event neither of them being established, judgment as a matter of law must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other."

(b) The majority hold that even though evidence is as consistent with innocence as with guilt, the case must go to the jury. This decision definitely overturns the *Hammond* case and in effect pronounces that it is no longer necessary for the Government's proof, assumed to be true on the motion, to foreclose the hypothesis of innocence.

(c) The majority maintain that the principle announced in the *Hammond* case and drawn from the *Isbell* case was meant as an instruction to the jury and in the process

of judicial interpretation has been twisted into a guide for a trial judge ruling upon a motion for directed verdict. The answer to this is the statement of Justice Miller in his dissent: This rule of law was arrived at after careful consideration by highly competent judges and has for a period of some thirty years been accepted by the overwhelming majority of federal jurisdictions in the country.

(d) In sustaining the conviction of the accused, the majority has adopted means which, if followed, will establish a departure from the law which has inherently serious dangers to the accused. The theory of the majority permits the jury to speculate or surmise and pick one of two irreconcilable inferences that might be derived from proven facts. These proven facts, all of them, were as consistent with the defendant's innocence as with his guilt and were circumstantial. These two inferences were set before the jury and they were permitted to choose the one that they surmised would comport with the defendant's conduct. This is a dangerous doctrine and forecloses the presumption of innocence. If the situation were a little different, that is to say, if there were these proven facts as consistent with innocence as with guilt *and also* a fact or facts which foreclosed any reasonable hypothesis of innocence that might be inherent in them, then obviously it would be the duty of the jury to take all of the facts and then determine whether the accused was guilty beyond a reasonable doubt. This situation must not be confused with the ordinary cases of balanced evidence. In these cases there is contradicting evidence which balances pro and con. Obviously this is for the jury. The situation with which we are dealing does not present contradicting evidence that balances, but on the contrary, all the evidence taken separately and as a whole is as consistent with innocence as with guilt. Taking the other extreme where

there is no balance, and the evidence is overwhelming against the accused, the case goes to the jury under a judge's instructions.

V

The presumption in law is that the accused is innocent until his guilt is proved beyond a reasonable doubt. This presumption continues even though the accused fails to testify. The burden is on the Government throughout to prove guilt beyond a reasonable doubt and overcome the presumption.

When the Presumption Is Overcome

The presumption of innocence continues until every material element of the crime is proved by competent evidence and is sufficient to satisfy the jury of guilt beyond a reasonable doubt and to a moral certainty. As a matter of law, the evidence may not be competent and thereby preclude any decision by the jury. Circumstantial evidence which does not directly connect the accused with the essential elements of the crime is not competent evidence and is not sufficient to overcome the presumption. It is of this caliber when the reasonable inferences are not plainly inconsistent with innocence, which thereby raises a reasonable doubt.

*Reasonable Doubt—When Raised*

To establish guilt, the evidence does not have to exclude all possible doubt but must exclude every reasonable doubt. A reasonable doubt arises when the evidence is as consistent with innocence as with guilt, any probability of innocence being sufficient to render the ultimate fact of guilt reasonably doubtful. But the probability cannot work the other way; that is, where there is a mere prob-

ability of guilt there is a reasonable doubt and a conviction cannot rest on mere probability. The presumptions and design of the law work in favor of the accused only and not in favor of the Government.

*Reasonable Doubt—When Not Raised*

There is no reasonable doubt when the evidence is consistent only with guilt. Mere doubt or conflict in the evidence is not sufficient to render a reasonable doubt.

*Province of Judge and Jury*

Credibility of witnesses and weight of the evidence are questions for the jury whose right it is to select between contrary inferences which may be drawn from the evidence. Whenever the question to be determined involves the application of some principle of law, it then becomes a question of law for the court. Given certain proven facts, the question of whether they raise a reasonable doubt is a question of law. If it is a case for the jury, then the jury determines whether the facts as it finds them to exist constitute reasonable doubt as defined by the judge. In deciding that the case is for the jury, the judge finds as a preliminary matter based upon definitions and limitations of the law that there is no reasonable doubt if the facts be credible. The jury then determines the facts and applies to them the rule that if the facts are as consistent with innocence as with guilt and do not point only to guilt they must find the accused not guilty. The jury finds the facts and fits them to the rule of law as defined by the judge.

If, as a matter of law the judge finds as a preliminary matter that there is a reasonable doubt as determined by the rule of reason in conjunction with the definitions of the law, it is no longer in the province of the jury and he

must direct a verdict. Where the evidence is circumstantial only and the incriminatory circumstances are equally compatible with innocence as with guilt, there is as a matter of law a reasonable doubt, and he must direct a verdict. He has not decided the facts and preempted the function of the jury. On the motion, the question to be decided involves the application of a principle of law, a matter for the court. A question is one of fact because of its own inherent character and not because it is decided by the jury instead of the judge. A question of law is one which by itself, without reference to whether it is determined by judge or jury, has a distinctive character which makes it such. It is the inherent quality of the entire question to be determined which is the test of its character as a question of law or a question of fact and when it is fundamentally one of law and for the judge, he does not preempt the function of the jury by incidentally deciding a question of fact. Therefore, the jury's province is not invaded when the question to be determined involves the application of some principle of law and a motion for directed verdict being such a question, the court may find that there is a reasonable doubt and that the evidence is insufficient to establish the guilt of the accused.

As was said above, this is a question involving the application of a principle of law and therefore, is for the court. In ruling on the motion, the court must determine the question of reasonable doubt. This he does by application of the rule of reason to the evidence and in the light of the minimum proof fixed by the law as a requirement to establish guilt. So if he concludes that either result is possible, a reasonable doubt or no reasonable doubt, in the light of the definitions of the law he must conclude that guilt has not been proved beyond a reaable doubt and that there is as a matter of law a reason-

able doubt. The question before him for determination is one of law, and because he concludes that a reasonable mind might possibly conclude either result, he cannot on that basis permit the case to go the jury. The determination of the whole question is for him and in deciding it he must himself by applying the rule of reason and all the definitions of the law, decide the question of reasonable doubt.

The subsidiary question is easier where the evidence is such that a reasonable mind must necessarily have a reasonable doubt, as it follows then that the government's evidence is insufficient to show guilt and in ruling on the whole question of law, he must grant the motion.

The motion is in the nature of a demurrer to the evidence, admitting the truth of the government's evidence and testing its sufficiency. The ground for granting the motion is insufficiency of the evidence which is determined by resolving the question of reasonable doubt. Where circumstantial evidence may be harmonized with innocence as well as with guilt there is a reasonable doubt. Normally the question of weight and sufficiency of the evidence is for the jury, but in ruling on a question involving the application of a principle of law, the judge must decide this preliminary question in ruling on the question of law.

The following are specific instances where the judge in deciding the preliminary question must find a reasonable doubt and consequently an insufficiency of the evidence: where the evidence fails to prove an essential element such as knowledge or intent, where it fails to connect the accused with the crime and where it does not lead irresistibly beyond a reasonable doubt to a conclusion of guilt. In all these instances, because there must necessarily be a reasonable doubt, the evidence is legally insufficient to sustain the charge. That being so, it is not for the jury to conjecture the question of guilt.

The Federal Rule that a verdict must be directed unless there is substantial evidence of facts excluding every hypothesis except that of guilt, is in harmony with the above conclusion. Upon the motion, the judge in determining reasonable doubt applies the rule of reason to this rule.

## ARGUMENT

### Point I

### The Language and Reasoning of the Dissenting Opinion of Justice Miller

The dissenting opinion of Justice Wilbur K. Miller (App. 71) in itself, together with the admission of the majority, abundantly establish the importance of the questions presented and the direct conflict of the opinion of the majority with the previous views of the United States Court of Appeals for the District of Columbia and several of the Circuits.

On the merits of the questions presented, the opinion of the dissenting justice is in keeping with those principles of American jurisprudence which have governed criminal trials for more than a century. Both on strict reasoning and logic, as well as by the authorities cited, Justice Miller is clearly right.

### Point II

### Additional Authorities and Argument Consonant With the Views of Justice Miller

The evidence at the trial was not merely consistent with innocence when tested by the motion which, under the authorities, is sufficient for reversal, but it was entirely inconsistent with any other conclusion. *Chambers* v. *United States,* 237 Fed. 513; *Harrison* v. *United States,* 200 Fed. 662. "Knowledge without some evidence of participation is not enough. Circumstances merely arousing suspicions

of guilt are insufficient. It must be remembered that appellant introduced no witnesses. In such case, when the circumstances relied on are as consistent with innocence as with guilt, they are robbed of all probative value." *Tingle* v. *United States,* 28 F. 573, 576 (8th C. C. A., 1930); cf. *Beckman* v. *United States,* 96 F. (2d) 15 (5th C. C. A., 1938); *Schmeller* v. *United States,* 143 F. (2d) 544 (6th C. C. A., 1944). The problem is thus entirely aside from the normal appellate practice of viewing the evidence most favorable to the Government and sustaining the verdict of the jury if there be *substantial evidence* to support it. See *Pierce* v. *United States,* 252 U. S. 239 and other authorities collected in footnote 8 of the majority opinion. In the *Pierce, Stilson, Glasser* and *Manton* cases, the proof adduced by the Government by the close of its case presumably foreclosed the hypothesis of innocence. The defense then went forward, the Government having borne its burden of proving guilt beyond a reasonable doubt. Then questions of credibility and the weighing of evidence, purely jury functions, came into play. The jury resolved the evidence after the Government, on a case assumed to be true, had established a hypothesis which excluded all reasonable hypotheses save that of guilt. The jury having properly resolved the evidence, there is obviously nothing left for an appellate court to do—after the impact of the verdict—than to see if there is *substantial evidence* to support it. But there can never be *substantial evidence* to support a verdict of guilt unless the proof in the Government's case contains a hypothesis which excludes all other reasonable hypotheses save that of guilt. The standards which go to make up substantial evidence in a criminal case so require. See discussion in *United States* v. *United States Gypsum Co.,* 51 F. Supp. 613, 632 (D. C. D. C., 1943). In the latter case the opinion is written by Justice Harold M. Stephens who says:

> "In *Hammond* v. *United States* the trial judge was confronted by evidence, the truth of which on the

Motion for Directed Verdict he was bound to assume, as to the circumstances under which the alleged assault with intent to commit rape occurred and as to how the defendant conducted himself. But, in determining whether the trial judge erred in his refusal to direct a verdict, the Court of Appeals considered . . . not merely whether the evidence was substantial in the sense in which that word is used in civil cases, i.e., such as a reasonable mind might accept as adequate to support a conclusion, but also whether it was sufficient to convince beyond reasonable doubt. Therefore, the decision necessarily constitutes a ruling for this jurisdiction that a trial judge upon Motion for a Directed Verdict at the close of the Government's evidence in a criminal case must not merely assume the truth of the Government's evidence and give the Government the benefit of legitimate inferences to be drawn therefrom, but must also consider whether or not the evidence, so regarded, could properly convince a jury beyond a reasonable doubt, and must if he reaches a negative conclusion on this question, grant the motion." (51 F. Supp. 632).

Justice Stephens thus maintains that the substantial evidence rule in a criminal case requires that the trial judge determine in connection with his duty of considering the substantial evidence adduced by the Government whether that evidence could properly convince a jury beyond a reasonable doubt. (51 F. Supp. 632-633). Necessarily, therefore, the trial judge must himself determine whether there is substantial evidence of facts which exclude every other hypothesis but that of guilt. (*Cady and Hammond cases*). Therefore, if all the substantial evidence is as consistent with innocence as with guilt, the trial judge must direct the verdict.

We would also invite the attention of this Court to *Dickerson* v. *United States*, 18 F. (2d) 887, 893 (C. C. A. 8) for the reason that this case is deemed complementary to the observations of Justice Miller on the significance of the

rule in *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333, 339 (App. 74).

In the *Dickerson* case the Court said:

> "Wherever a circumstance relied on as evidence of criminal guilt is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference guilt may be fairly deducible. To warrant a conviction for conspiracy to violate a criminal statute, the evidence must disclose something further than participating in the offense which is the object of the conspiracy; there must be proof of the unlawful agreement, either expressed or implied, and participation with knowledge of the agreement" (Citing cases).

The Court said in *Marrash* v. *United States*, 168 Fed. 225, 231:

> "We are unable to find sufficient evidence to sustain the verdict against Habib Marrash. There are some suspicious circumstances and facts which seem to indicate that he had knowledge of the illegal nature of the transactions, but there is nothing which arises to the dignity of proof required in criminal causes. Knowledge by an alleged co-conspirator that the other defendants were attempting to defraud is not enough. Mere suspicion that he was a party to the conspiracy is not enough. *United States* v. *Newton* (D. C.), 52 Fed. 275.

Since, therefore, the evidence, even when construed most unfavorably to the petitioner does not sufficiently overcome the presumption of innocence (*Roukous* v. *United States*, 195 Fed. 353 (C. C. A. 1); *Becker* v. *United States*, 5 Fed. (2d) 45 (C. C. A. 2)), the Court erred in refusing to direct a verdict of acquittal as to him.

In *Lopez* v. *Campbell*, 163 N. Y. 340, the New York Court of Appeals said, at pages 347-8:

> "Where the evidence is capable of an interpretation which makes it equally consistent with the absence as

with the presence of a wrongful act, that meaning must be ascribed to it which accords with its absence. In other words, it can only be established by proof of such circumstances as are irreconcilable with any other theory than that the act was done. As has been said: '*Insufficient evidence is, in the eye of the law, no evidence*' " (Cases cited). (Italics ours.)

The rule of law that "*insufficient evidence is, in the eyes of the law, no evidence*", was cited with approval in *Matter of Case*, 214 N. Y. 199, 203 (per Cardozo, J.), and in *People* v. *Galbo*, 218 N. Y. 283, 292.

See also:

*Nosowitz* v. *U. S.*, 282 Fed. 575 (C. C. A. 2);
*Reed* v. *U. S.*, 51 Fed. (2d) 941;
*Graceffo* v. *U. S.*, 46 Fed. (2d) 852;
*Karchmer* v. *U. S.*, 61 Fed. (2d) 623;
*U. S.* v. *Buchalter*, 88 Fed. (2d) 625 (C. C. A. 2).

All of these cases hold that, where there is no substantial evidence to overcome the presumption of innocence, it is error to deny defendant's motion to dismiss the indictment.

## Point III

**The District Court Apparently Found Some Evidence to Support the Government's Case But Did Not Even Meet the Standards Prescribed by the Majority in the Court Below.**

It is laid down in the opinion of the majority that,

> "The judge's function is exhausted when he determines that the evidence *does* or *does not* permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind" (Page 4).

The opinion discusses the question in the abstract. No statement is made by the majority as to what the Court be-

low did or did not do. Thus, assuming the above quotation to be a correct expression of the function of the trial court on the motion, we look to the record to determine whether the trial court *determined* that the *evidence before him* did or did not permit the conclusion of guilt beyond a reasonable doubt. What did the District Judge say?

> "I have not said, of course, whether I thought the evidence was sufficient to justify a conclusion that any defendant was guilty or conclusion that any defendant was guilty beyond a reasonable doubt. I have not said either way. I denied motions to direct verdicts; that is all I did" (R. 3857-3858).

It seems perfectly clear that the trial court never did determine that the evidence before him *could* properly convince a jury beyond a reasonable doubt of the defendant's guilt. That is the minimum, under any view, that the *nisi prius* function demands. The Court must determine that the "evidence does or does not permit the conclusion of guilt beyond reasonable doubt" (Page 4, majority opinion). It would appear that what the trial court did was put the defendant to his defense on the theory that there were some circumstances which required the defendant to go forward and explain. This position was unsound for the reason that there is no such burden on a defendant in a criminal case. The trial court failed to adhere to the oft-recited, but sometimes less observed, requirement of the prosecution to make out a case beyond a reasonable doubt by the close of the government's case. That failure is the basic cause of the difficulties which have since followed. Consequently, a body of proof lacking in evidentiary sufficiency was permitted to go to a jury and, after conviction, the trial court, having erroneously sent the case to the jury in the first place, then invited the appellate court to "take this record and pass upon it before the defendants actually suffer any punishment I have imposed" (R. 3903). This is a new twist

in expediency and we find no law to sanction the method. The majority in the Court below then concede a diversity and contrariety of view in the Circuits with respect to the legalisms in the cause and ground may be said to exist for the exercise of the certiorari jurisdiction in the Supreme Court. But, at the bottom of the entire structure of this case as it adds story upon story, was the basic lack and insufficiency of the evidence.

## Point IV

### An Analysis of the Rule in Hammond v. United States

*The Function of the Trial Court on the Motion for Directed Verdict*

The function of a trial court when presented with a motion for directed verdict in a criminal case is to examine all of the substantial evidence proved by the prosecution, give to it the benefit of the presumption of its truth and the effect of all reasonable deductions reasonably to be made from the facts in proof. The motion is perhaps the broadest one which the law contemplates at any point in any litigation. It covers the complete state of the testimony up to the time of its presentation. The duty of the judge is plain. About that there need be no interpretation and there can be no question. Although the burden may be heavy, it is his job to assume it. See *Quercia* v. *United States,* 289 U. S. 446, 469, 77 L. Ed. 1321, 1324, 53 S. Ct. 69; *Bollenbach* v. *United States,* 90 L. Ed. 318, 321. The law puts that load upon him. He is trained and experienced. The law does not compare conveniences, where human rights are involved, to liberty, life, and honor. As against the defendant's right to protection against speculation upon the part of the inexperienced, untried and untutored jurors, their bias, prejudice and passion, the motion for a directed verdict appeals to the skilled, experienced mind of

the judge and directs him to view the testimony in the manner hereinbefore described. In the prevailing opinion in laying down the rule, the Court below says of the judge that

> "In passing upon a motion for a directed verdict of acquittal, [he] must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt upon a reasonable doubt."

So much of that sentence as relates to the duty of the judge to give full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact, is confusing and indicates confusion as to the duty of a judge upon the motion. The judge is not required to give full play to the right of the jury in these respects at all because he has to assume the proven facts to be true and all justifiable inferences of fact from those proven. In other words, on the motion the trial judge has no concern with the duties of the jury. The law has fixed his duty, in fact, on the motion there is no question for jury consideration simply because the law assumes the facts and justifiable inferences therefrom to have been proven and hence there can be no question of credibility of witnesses, of weight of evidence, or of justifiable inferences from proven facts. The law dispenses with these questions by declaring simply there is no question about any of them. The trained and experienced mind of the judge can be relied upon to follow the law. The entire bulk of legal experience upon this motion in the past and up to this decision has never found basis for criticism in the operation of the law under it as it defines the duties of the court on the motion for a directed verdict.

*The Hammond Circumstantial Evidence Doctrine*

The *Hammond* case emphasizes the character, nature, quality, kind and quantum of evidence. Whatever impact *Hammond* may have upon the well known distinction between the provinces of court and jury, that impact is purely incidental to the main emphasis toward which *Hammond* is directed. The sole distinction to which *Hammond* relates with emphasis is that between the probative value of circumstantial evidence and the conviction of a defendant thereunder and that of direct evidence where the defendant is directly connected with the events charged. A circumstance *per se* proves nothing. Its probative value is *nil* unless and until that circumstance by a reasonable explanation or inferential force can be related to conduct on the part of the defendant which connects him circumstantially with the *corpus delicti* defined in the indictment. Experience has proved abundantly that circumstantial evidence is dangerous always of acceptance for a satisfying verdict of guilt against an accused.

Whereas theoretically and as an academic proposition, prosecutors and text writers have observed frequently the difficulty of convicting under circumstantial evidence, the practicing lawyer who is experienced in meeting attacks made circumstantially against his client, knows that cumulative circumstantial evidence is the most difficult to rebut. That is true because a circumstance has as many complexions and differences in color, force and probative value as the skill, ability and experience of him who is describing them can either impart or give to them. The not unusual result is that a verdict often is returned because the comparative ability of opposing counsel in handling circumstantial evidence is such that the opposing counsel is unable to answer with equal persuasiveness or ability the varying

inferences or capacities to persuade which the prosecutor can give to the circumstances he has put in evidence. This is not due to any inherent probative value of the circumstances *per se.* It results rather from the ability of him who is arguing from them. Again, circumstances are essentially equivocal in their inherent character. This cannot be denied. Therefore, whatever character the circumstance possesses it receives from the lawyer who gives that character to the circumstance It is, as said before, essentially, inherently and of its very nature equivocal in fundamental character and of itself alone can prove nothing.

These observations are the undeniable utterances of human experience over centuries. The courts have recognized it because to deny it is to disaffirm a fact incapable of denial. Courts have recognized also the inherent danger of such testimony because of the essential difficulty of probative value *per se* in circumstances proved. The law knows that the prosecutor is usually skilled, experienced and able. Accused are not always in a position to be protected by counsel equally skilled, able and experienced. And when the conviction of a defendant depends almost exclusively upon circumstantial evidence proved against him, the law has always been careful to scrutinize that conviction to see to it that inferences drawn from those circumstances have been justified and that they have not been used as grounds for permitting the speculation of or arousing the bias, prejudice or passion of the jury. *It is to that kind of a case which Hammond points its emphasis.* It is that recognition of fundamental human and experienced justice to which *Hammond* relates. It does not concern itself with the province of the court or the jury. The law on the motion for a directed verdict is sufficient to that end. The court in *Hammond* recognized this. Everything which the *Hammond* case says implements the basic law of criminal justice

as defined in the presumption of innocence and the burden of proof beyond a reasonable doubt. *Hammond* recognized that both of these fundamental and basic rights of the accused require sedulous and diligent protection. In this light the court is compelled under the law of a motion for a directed verdict to examine the evidence against the accused of which the substantial portion is circumstantial.

All that *Hammond* does, therefore, is to declare the law on a motion for a directed verdict when the substantial evidence against the defendant in a given case is circumstantial in relation to the presumption of innocence and the burden of proof. It is submitted, with great respect, that if the law of *Hammond* is abandoned at this point or its force emasculated by interpretation to the meaning pressed upon it in the prevailing opinion herein, the presumption of innocence will be impaired to the degree of practical destruction and the burden of proof made light to the point where obligation as to *quantum* of proof disappears entirely.

*The Rule of the Majority Below Sets a Lower Standard than Prevails in a Civil Case*

Under the rule announced by the majority in the Court below the defendant in a civil case enjoys far greater protection than the defendant in a criminal one. In a civil case there is no doubt as to how the court will rule upon a motion for a directed verdict where the evidence is in equipoise. No member of the profession has ever thought that that law invaded the province of the jury or that the court is preempting its functions when it exercises the duties placed upon it when the motion is presented. No court has ever had difficulty in staying within the domain of its own functions under that rule. No objection has ever been raised to the rule by any member of the profession. It is hornbook law, as the profession considered *Hammond* to be

hornbook law, up to this time. They both are and have been hornbook law because the rule in both civil and criminal cases in that regard is but the plain expression of the common sense principles of ordinary decent justice. If he who makes the charge is not to be burdened with its proof, then defendants in both civil and criminal cases are without protection against charges preferred without foundation or basis. Juries then become not triers of facts proved but speculators upon what they think ought to be done.

*The Rationale of the Hammond Case*

What then is the rationale of *Hammond?* Circumstantial evidence being of an essentially and inherently defective nature and character *per se, Hammond* merely expresses in plain language a rule of equal justice. No one quarrels with the contention that a jury as triers of the facts, have both the right and obligation to resolve reasonable doubts arising from proven facts. But a fact is a fact. A circumstance is not necessarily a fact. All testimony is not evidence. It is the duty of the court to determine what testimony is legal evidence. And before a jury tries facts, it must have facts before it. It must have legal evidence. Resolving a doubt does not relate to the nature of evidence. The evidence which a jury takes with it to its jury room, whether documentary or oral, always remains the same. The jury cannot change it. The evidence are the tools with which the jury works. The jury did not fashion those tools and the jury cannot remold them in the jury room. One juryman may change the mind of another juryman with reference to his reception of given evidence, but the evidence is the same always. Another juryman may change the opinion of a third with reference to the credibility of a witness or the importance of a given piece of evidence in its relation to the charge under consideration, but the evidence is the same. The juryman hasn't changed the evidence.

He has changed another juryman's mind in his approach to that evidence.

When, therefore, does circumstantial evidence rise to the dignity of genuine evidence worthy of a jury's consideration in a criminal case? It cannot be argued logically, reasonably or justly that every circumstance should be put before the jury for their determination as to its use. As well one might hand to a crowd of boys the instruments of a sport and tell them to play the game without the observation of any rules.

The law has recognized the inherent danger of circumstantial evidence because of its natural deficiency in probative value. But of its strength and vigor when examined, analyzed, distorted or used by the suspicious, the impassioned, the hostile, or the fair and reasonable mind of him who looks through the glass to magnify the circumstance beneath it, there can be no doubt. Knowing the indisputable fact that a circumstance is *per se* equivocal in its character, the law has said that when it is used as a weapon against an accused, the circumstance must be such that reasonable minds see in it, if believed, *only* conduct on the part of the accused that the circumstance against him could not have existed unless he were guilty of the charge preferred against him if believed by the jury. That principle is one of commanding justice. No other conception of the use of circumstantial evidence can be made and preserve intact the presumption of innocence or the burden of proof beyond a reasonable doubt.

If inherently, essentially and by its very nature circumstances can be made equally to appear as instruments to establish either the innocence or the guilt of the accused in accordance with the use made thereof by him who is maintaining either innocence or guilt, it cannot be said that *per se* the circumstance is proof of guilt beyond a reasonable doubt, since inhering in its very nature is the reason-

able doubt beyond which the jury must go to find the defendant guilty. To apply this to the doctrine of the prevailing case under the true rule as defined therein, the Court below says:

> "If he [the judge upon a motion for directed verdict] concluded that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion;"

How can there be anything but "a doubt in a reasonable mind" upon evidence which in its essence contains a reasonable doubt, because it is equally consistent with innocence as with guilt? To assert the contrary is to state an inherently logical inconsistency. The reasonable mind might just as valuably debate the proposition as to whether God being all powerful can make a stone heavier than he can lift.

No jury could possibly return a reasonable verdict upon evidence which is equally consistent with the defendant's guilt as with his innocence by its very nature. The jury has no tools to work with. The jury would then be asked by the court to perform the impossible task of resolving evidence beyond a reasonable doubt which essentially has within it by its very nature the very reasonable doubt which they are asked to remove and which by its very nature cannot be removed. Essentially, inherently and necessarily it is equivocal.

In a civil case should a jury return return a verdict upon such evidence the court would not hesitate to set it aside, because it would be against the weight of the evidence or because the jury made up its verdict on no real evidence at all. Particularly in cases such as this where fraud is of the essence, the case and textbook law are both filled with the expressions of the law that no one accused of fraud can be convicted thereof *even in a civil case* except upon clear and unequivocal proof. To speak, therefore, of the right of a

jury to resolve doubts upon essentially equivocal testimony is to invite speculation and employ a misnomer. No verdict is a *vere* under such a circumstance. That is the rationale of *Hammond*. It relates to the quality, character, kind and essence of testimony which enjoys the dignity of evidence and which the court may refer to the jury on deliberation.

Again, the opinion says the motion must be granted "if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt." That statement of the law is in strict conformity with the *Hammond* case. Once it is shown that the evidence mentioned in the quotation is no evidence, it is an essentially logical inconsistency and a genuinely logical impossibility for any reasonable mind to fairly conclude guilt beyond a reasonable doubt upon circumstances which essentially and inherently contain within themselves an equivocation so intense that the circumstances reasonably, to a reasonable mind, point toward innocence as strongly as toward guilt. With great respect, it is submitted that the sentence following the one just quoted and reading: "If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter" indicates misconception of the *Hammond* case and of the law in criminal prosecutions, as related to the *Hammond* case. No practical lawyer contends with the academic assertion that the court "must let the jury decide" upon evidence, real evidence now, which may produce in the minds of some jurors a verdict of guilt beyond a reasonable doubt, whereas in the minds of others it fails so to do. That, as the opinion indicates, is usually the experience of the jury in many criminal cases. Hung juries but emphasize the statement. However, the misconception lies not in this declaration of the appropriate function of the court as opposed to the jury, but in assuming that the

circumstantial evidence of the character hereinbefore described is evidence under the use of the word in the sentence quoted.

Where there is direct testimony connecting a defendant with the charge and where that testimony points to his guilt if believed, the jury obviously is the tribunal to determine the weight to be given it, the credibility of witnesses, the weight of the evidence and reasonable evidence deducible therefrom in order to determine the guilt or innocence of the accused. But no jury has the right to take to its jury room only evidence of circumstances which necessarily are essentially equivocal and reasonably by their very nature point to the innocence or guilt of the accused. Under such a situation a jury ceases to be a deliberative body and the life, liberty or honor of the accused becomes the subject of speculation or the object of bias, prejudice and passion. There can, therefore, be no "two results" on circumstantial evidence of this character. It is of evidence of that character that *Hammond* speaks. It protects the accused against conviction upon equivocation. It protects him against a verdict impossible of formulation beyond a reasonable doubt upon evidence which always has within it the inherent and inescapable element of reasonable doubt. It prevents the processes of the criminal law from being distorted into mere verbal formulae and the substance of the protection which the law gives an accused from being reduced to the form and show of justice while in fact the substance itself has been destroyed.

The Court below again recognizes that this question of circumstantial evidence is a difficult one when it becomes the subject of a motion for a directed verdict. The Court says:

> "In a given case, particularly one of circumstantial evidence, that determination may depend upon the

difference between pure speculation and legitimate inference from proven facts."

*Hammond* has defined that difference and established a rule of law to guide the Court in the difficulty mentioned in this quotation. The "pure speculation" exists where "all the circumstantial evidence is as consistent with innocence as with guilt". It is "pure speculation" where the jury is permitted to argue about circumstantial evidence which does not "exclude every other hypothesis but that of guilt". The only "proven facts" from which "legitimate inference from proven facts" exist in a circumstantial evidence case is the fact of the circumstance itself. When the Court below, therefore, speaks of drawing "legitimate inference from proven facts" the *Hammond* case defines those "proven facts" to be as hereinbefore stated. This rule which "is frequently difficult to apply" does not when applied compel the judge to "preempt the functions of the jury". Everything which the judge does under the *Hammond* case he does upon the occasion of the presentation of any motion for a directed verdict. The *Hammond* case merely instructs him as to what to do with testimony which does not rise to the dignity of evidence to go to the jury because it is essentially defective in the particulars defined therein.

A judge does not "preempt the functions of the jury" on any motion when he decides, for instance, that all of the evidence as presented by the prosecution, giving to it the benefit of truth, does not connect the defendant with the corpus of the crime charged or does not establish all the elements thereof. Under the *Hammond* case the judge merely determines that all of the evidence presented is so equivocal in character essentially that reasonable minds may draw therefrom reasonable inferences of innocence as reasonably as other minds might reasonably draw therefrom inferences of guilt. No jury can cure that situation by being asked to

return a verdict either way upon such evidence. The jury cannot find that the defendant *necessarily* intended to commit the crime. (Emphasis relates to *Hammond* and *Cady* pronouncements). It simply is no evidence at all. It has no probative value of guilt. It has no probative value for innocence. It is simply equivocation, not proof. There is then no invasion of the province of the jury or presumption of their functions when the rationale of the *Hammond* case is understood and applied. The statements of the opinion in defining generally the province of the jury and the care it indicates to prevent encroachment thereon by the court, are all reiteration of basic undisputed principles of law. The misconception lies in the misapplication to the doctrine of the *Hammond case.* The preponderant body of the law recognizes that no accused can be denied the benefit of his presumption of innocence by having it destroyed by testimony which reasonably has the inference of his innocence essentially inherent in it. No verdict of guilty beyond a reasonable doubt can exist thereupon. We are dealing in impossible inconsistencies which verbiage may conceal but which reason has no difficulty in detection.

Nor does the judge preempt the function of a jury when he concludes in a given case that the proof adduced by the Government does not foreclose the presumption of innocence, The judge had to assume the truth of the proof. Assume that the defendant stood on the motion as he has a right to do (*Vth Amendment, Constitution of the United States* and see also *Bruno* v. *United States,* 308 U. S. 287), the jury then weighs the evidence and determines the credibility of the witnesses, and may acquit or convict. All the judge has done is determine there is a case for the jury, triers of the facts.

## Point V

### The Analysis of the Circumstances by the Majority in the Court Below

To find as the Court below says in the opinion "under the circumstances of the case, that to us, as to the jury, there is no doubt", as to petitioner's guilt is explicable, we submit respectfully, only upon the misconception of the duty of an appellate court in a circumstantial evidence case where the evidence was as consistent with innocence as with guilt. The Court below says frankly: "We agree, as Curley contends, that upon the evidence reasonable minds might have had a reasonable doubt" (App. 68). The question is not whether "reasonable minds might have had a reasonable doubt", but whether the jury in this case had evidence before it which in itself was not as consistent with innocence as with guilt.

The question relates not, therefore, to what reasonable minds might do with acceptable legal evidence, but whether there was any acceptable legal evidence as hereinbefore discussed upon which reasonable minds might operate. The distinction is clear. To petitioner it is critical. It meant the difference of being convict under the misapplication of the prevailing opinion and its misconception of *Hammond*, or going acquit under the true rule of *Hammond* and the preponderant law of other jurisdictions.

A cursory analytical examination and study of the majority's conclusion of guilt exposes the fallacy so frequently indulged and so dangerous in cases of circumstantial evidence, that counsel desire to say this much thereof: Trials are intensely practical matters. Theories dissipate in the heat and strife of litigious contest. Applications of academic and general rules of law often go into the discard. The contest is actual. A man's life, liberty or honor is always at stake. The prosecutor is intent. He may be convinced justifiably of the right of the prosecution. In a con-

spiracy case such as this, defense counsel plead for the application of the rule that first the conspiracy should be established before the jury is allowed to hear statements or admissions of alleged co-conspirators, or be given documents written or prepared by them. As a practical matter, the request for the application of this rule of ordinary justice is denied offhand. Into the trial go these documents. The prosecutor has carefully selected them. Those which are most damaging or inflammatory are the subject of his careful choice. They go in en masse.

Human nature does not change because a man is summoned as a juror. Most of the evidence will be circumstantial. The glass through which the jury examines that testimony under its right to "weigh the evidence, and draw justifiable inferences of fact" has been colored well before defense counsel on a motion for a directed verdict analyzes the testimony to determine whether the fact of conspiracy in the first instance has been proved at all. Too often, as here, the activities of a group have been heard and proved, and those innocent of engaging in any of those activities fall under the condemnation generally made of illegal acts done by others, of whom they had no knowledge and with whom the proof shows no common agreement, understanding or combination and, further, with whom the background establishes they never would have confederated had they known the facts. On appeal *where a conviction has been had,* the appellate court then studies a cold record. Trained judgment opposes subconscious impressions. The danger, however, to the innocent has been increased by the *fact of conviction.* The situation now requires a keen and studied analysis and a determination to provide the convicted's innocence the full benefit of the protective principles of the criminal law.

It is respectfully submitted that the comments with relation to Group activities in the prevailing opinion cannot

be charged and are not chargeable to petitioner. He engaged in none of the Group activities condemned in the indictment. Over a wide range of busy months, the evidence of petitioner's activities is so thin and of its nature so consistent with honesty and good purpose, that it wrenches the presumption of innocence and proof beyond a reasonable doubt from the protection for which they exist and to which he was entitled. Only in the denial of the application of the law as to the appellate function as stated in the *Hammond* case can the explanation of petitioner's conviction be found. Disconnected with the Group's activities as petitioner was, to attach to him reference to those activities, to find him guilty under contracts negotiated with people whom he never saw or heard of, and to describe the activities of the Group as "total" and the misconduct thereof uniformly illegal, is to pull one's self up by one's bootstraps when attempting to establish an innocent person to be a conspirator in an unlawful scheme and to have engaged in the conception and formulation of that scheme from the beginning. It illustrates the danger hereinbefore stated. It convinces that innocence is impossible of protection if it is submitted to an analogous *post hoc ergo propter hoc process* of reasoning whereby guilt in the initial formulation of the scheme can be established by activities equally consistent with innocence and which may have been performed equally honestly by one who honestly believed in the misrepresentations made to him.

The comments, therefore, upon the activities of the Group contain within them no probative force to the production of a guilty verdict against petitioner and cannot logically become the basis of the assertion in the opinion "but total misrepresentation of the corporate affairs and total diversion of funds is substantial ground for an inference of knowledge on the part of an active and experienced president." There was not an iota of proof

that petitioner "was an active and experienced president." The record is devoid of any evidence upon which justification for the use of those adjectives can be made.

Again, the Court asserts that the jury might "fairly and legitimately infer as a fact from the proven facts that Curley knew of the wrongs being committed." That conclusion is speculative, because Curley's connection with the proven facts was never proved. The "proven facts" must, of course, be "proven facts" of legality. It is hornbook law that the jury may not "fairly and legitimately infer as a fact from the proven facts" the knowledge of another innocent defendant of the wrongs being committed, unless there is in the evidence, real evidence again, some foundation in proof that "the wrongs being committed" were "being committed" under such circumstances that no reasonable man could fairly deduce from the proof of those "proven facts" under the circumstances of the case anything but the knowledge thereof in the innocent defendant. Counsel challenges the discovery of such "proven facts" in this record. It does not exist. The prosecution would have shown them had they existed.

Fairly analyzed within the law of the *Hammond* case, or even this definition of the new rule now submitted, this record is devoid of any substantial evidence from which a reasonable mind, reasonably deliberating and weighing the evidence and deducing only reasonably such facts as are reasonably inferable from such evidence, could possibly reasonably conclude that petitioner was guilty beyond a reasonable doubt. The record is positively without substantial evidence that he ever joined in any scheme which had for its purpose the objective denounced in the indictment. It is respectfully submitted that if now he is accorded the fundamental right to the benefit of the law as it stood when he was tried and the Court applies

that law within the philosophy and the rationale of the *Hammond* case, in justice to petitioner there can be no other conclusion than that speculation occupied the place of deliberation and conviction did not flow from the pure course of the law.

POINT VI

**The Failure of the Trial Court to Limit by Instruction the Testimony of Petitioner in the Boston Supplementary Proceedings.**

During the trial, there was received in evidence the testimony of petitioner given in supplementary proceedings taken in the Municipal Court of the City of Boston, on behalf of a judgment creditor. The testimony was admitted on the authority of *Feldman* v. *United States*, 322 U. S. 487, 88 L. Ed. 1408, 64 S. Ct. 1082 (1944).

The testimony of a Government witness who had combed all of the Group books and records showed that petitioner had not received a single cent from the Group, unincorporated and incorporated, nor from Fuller. (R. 2823, 2824; Govt. Ex 108, 167-172, inc.) Further, the proof showed conclusively that petitioner *had not received any money paid over by any defrauded victim to Fuller.* (R. 2823-2849) Disbursements to Fuller and all other persons, directly or indirectly, were shown.

Notwithstanding this proof, the Government then proceeded to show through the supplementary proceedings aforesaid that petitioner on December 15, 1941 had testified that in August, 1941, he received "$3,500 . . . from an official (Fuller) of the Engineers' Group in Washington . . . an advisory body of engineers that transacts business there." (R. 3180) The $3,500 was paid over in currency by petitioner to a Boston bank not later than August 8, 1941 to take up the *second* of two checks of one Irving

*Newcomb,* payable to and endorsed by Fuller, which had not cleared. (R. 3152-3715. *Newcomb* was not called as a witness by the Government.

The first money received by the Group from any defrauded victim was on August 12, 1941. The *Newcomb*-Fuller-Curley transaction aforesaid was in no wise a Group transaction or in any way connected with any victim. The Group check book, bank statements and ledger (Govt. Ex. 108) showed in detail the sources to which the first money collected, and subsequent monies, were paid.

The District Court held the testimony relevant and material on the theory that in the Boston Supplementary Proceedings petitioner in "effect" stated that he received the $3,500 in currency from the Group through Fuller. Exception was noted. (R. 3224, 3239; 2175; 3715) The Court below merely treated the subject in passing, (App. —) remarking that there was "a dispute as to the source of the payment . . ." *There was none.*

The testimony having been admitted, petitioner asked the District Court to instruct the jury that the testimony with respect to the receipt of $3,500 was admitted solely as a circumstance showing that Fuller and petitioner knew each other and had some business relationship in late July and early August, 1941; that it was not evidence that the $3,500 was Group money; that there was no evidence that petitioner received any Group money or the money of any alleged victim; that the jury could not infer that petitioner received any money of any alleged victim; that the $3,500 was turned over to petitioner sometime prior to August 8, 1941, and that the first monies received by the Group was a check of August 12, 1941. The District Court refused the prayer (R. 3287-8; 3804) and in a skeletonized charge (R. 3731-3744) made no comment whatsoever on the testimony in the supplementary proceedings.

What did the prosecution do with this testimony which went in wholesale and unlimited? The Government argued to the jury that petitioner had received $3,500 of the monies of these *defrauded victims* (R. 3720) right under the very dome of the Capitol. (R. 3700, 3710) Combine this situation with permitting the jury to speculate that petitioner had received some part of the $18,000 that Fuller withdrew from Group funds (R. 3710) and it is no wonder that the conviction was had. The prosecutor argued:

> "Well, *again*, you know from what has already been told you, from the exhibits you have seen, and from the exhibits you can see, that Fuller got at least $18,000 out of this thing, checks or cash, and we know that $3,500 in cash was given to Mr. Curley from Fuller." (R. 3710)

That this was not harmless error (See 28 U. S. C. A. 391) in a mere matter of the admission or exclusion of evidence is made manifest *by what the jury did* in the light of the argument of the prosecution:

The jury had the case over thirty hours before it brought in a guilty verdict. Four hours before the verdict was returned, the jury requested and received, without the knowledge or presence of counsel, the *Newcomb checks* (Govt. Exs. 173D and 173E) relating to the $3,500 transaction aforesaid (R. 3905).

The law is clear that a duty rests on the trial court to limit the admissibility of testimony where proper by instruction to the jury.

*Hersch* v. *United States*, 68 F. (2d) 799, 807 (9th C. C. A.);

*Hendry* v. *United States*, 233 Fed. 5, 18 (6th C. C. A.);

*Calderon* v. *United States*, 279 Fed. 556 (5th C. C. A.);

*United States* v. *Schanerman*, 150 F. (2d) 941, 946 (3rd C. C. A., 1945).

See also:

*Orloff* v. *United States*, 153 F. (2d) 292 (C. C. A. 5, 1946);

*Thomas* v. *United States*, 151 F. (2d) 183 (C. C. A. 6, 1945), 53 Am. Jur., Sec. 97, p. 87.

To the trial practitioner, the crucial testimony as to petitioner has just been considered. We submit that the books on the law of evidence and procedure might well be discarded if a conviction can be so secured. That this was the crucial testimony is made evident by the further statement of the prosecutor in the closing argument to the jury that petitioner received $3,500 in currency from Fuller in early August, *"And that is the important part of this case"* (R. 3674-3675).

See: *Bollenbach* v. *United States*, 90 L. Ed. 318 (1946).

## Conclusion

It is respectfully submitted that the petition should be granted.

WILLIAM E. LEAHY,
NICHOLAS J. CHASE,
*821 15th Street, N. W.,*
*Washington, D. C.,*
*Attorneys for Petitioner.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1946**

---

# No. 1211

---

JAMES M. CURLEY,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA

---

**MOTION TO DISPENSE WITH PRINTING OF RECORD ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.**

---

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Comes now the Petitioner, James M. Curley, by his attorneys, William E. Leahy and Nicholas J. Chase, and respectfully moves the Court to permit Petitioner to proceed with his Petition for Writ of Certiorari seeking a review of the Judgment of the Court Below without being required to print the Record in the said cause.

Judgment was entered on January 13, 1947 in the United States Court of Appeals for the District of Columbia. Re-

hearing was denied on February 4, 1947. The Petition for Writ of Certiorari must be filed not later than April 5, 1947.

The Record was not printed in the Court Below for the reason that the Chief Justice of said Court permitted the parties to proceed on the typewritten transcript and original exhibits. Counsel for Petitioner had hoped to enter into a Stipulation with the Government whereby only those portions of the Record which were felt to be germane to the consideration of the questions to be raised on Certiorari would be printed; however, after conferences extending over a period of ten days, it has been made to appear that the parties are unable to arrive at a Stipulation for the reason that the Government feels that it will be required to make many and copious references to the entire transcript and exhibits. This for the further reason that the Government will maintain that the sufficiency of the evidence is inherent in the questions to be raised in the Petition.

Accordingly, in order that the consideration of the Petition for Writ of Certiorari to be hereinafter filed may be had during the present term of this Honorable Court, the Petitioner files this Motion asking leave to proceed on the typewritten transcript and original exhibits. The Government does not oppose the instant Motion and advises counsel that a written Memorandum to that effect will be filed with the Clerk of this Honorable Court.

If the Petition for Writ of Certiorari is granted, the entire Record can be printed without unnecessarily delaying the consideration of the cause on the merits. If this Honorable Court grants the instant Motion, counsel for Petitioner propose to print as an Appendix to the Petition for Writ of Certiorari certain limited portions of the Record which are felt to be germane to a consideration of the questions to be raised in the Petition.

WHEREFORE, the premises having been duly considered, it is respectfully prayed that leave be granted the Petitioner to file a Petition for Writ of Certiorari on the typewritten transcript and original exhibits as embodied in the original Record certified to this Honorable Court by the Clerk of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

WILLIAM E. LEAHY,
NICHOLAS J. CHASE,
*821 15th Street, N. W.,*
*Washington, D. C.,*
*Attorneys for Petitioner.*

(9961)

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

G. J. No. — Orig.

Criminal No. 73085

Violations of Secs. 338 and 88, Title 18, United States Code

## DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

UNITED STATES OF AMERICA

*vs.*

JAMES G. FULLER, DONALD WAKEFIELD SMITH, JAMES BARTON UNDERWOOD, JAMES M. CURLEY, MARSHALL J. FITZGERALD, BERT HALL, DAVID E. DESMOND.

### INDICTMENT

The Grand Jurors of the United States of America, duly impaneled, sworn and charged, at a regular term, to wit, the October 1943 Term, in the District Court of the United States for the District of Columbia, inquiring for the said District at said term of said Court, upon their oaths present and find as follows, to wit:

I

That throughout the time hereinafter mentioned in this indictment there was a class of persons, firms and corporations in the several states of the United States which was desirous of obtaining, among other things, (a) contracts for the construction of houses and apartment buildings, the financing of which said houses and apartments would be insured by the Federal Housing Administration, an agency of the United States; (b) contracts for the excavation of basements and foundations for houses and apartment buildings, the financing of which would be insured by the Federal Housing Administration; (c) contracts for the

construction, repair and remodeling of apartment buildings, office buildings and other buildings; (d) contracts for the manufacture of shells, ammunition, bomb fuse parts, and other kinds of materials used for the prosecution of warfare and otherwise; (e) engineering services necessary to the construction of the said houses, apartment buildings, office buildings, hotel buildings and other buildings, and (f) engineering services necessary to convert plants and factories to the manufacture of the said shells, ammunition, bomb fuse parts, and other kinds of materials used for the prosecution of warfare and otherwise, and for the training of workers for the manufacture of said materials, which said persons, firms and corporations would be and could be induced to make certain advance payments and do certain things, hereinafter more fully described, alleged to be preparatory to and in connection with the obtaining of such contracts and engineering services, upon the representation and promise that thereby and thereafter such contracts could be and would be obtained for them and such engineering services could be and would be furnished to them, said persons, firms and corporations being hereinafter referred to as "persons to be defrauded."

II

That heretofore, to wit, during a period of time commencing on or about the 20th day of June, 1941, and continuing thereafter up to and including the 28th day of February, 1942, at the City of Washington, District of Columbia, and within the jurisdiction of this Court, and in the states of Massachusetts, New York, Rhode Island, Pennsylvania, Ohio, Michigan, Indiana and Illinois, and at various other places to the Grand Jurors unknown and therefore not set forth herein, James G. Fuller, Donald Wakefield Smith, James Barton Underwood, James M. Curley, Marshall J. Fitzgerald, Bert Hall and David E. Desmond, who are hereinafter designated as the defendants, devised and intended to devise a scheme and artifice to defraud J. W. Bishop and Company, Worcester, Massachusetts; J. J. Powers Company, Cambridge, Massachusetts; Schweers and Smith, New York, NewYork; Key West Construction Company,

New York, New York; Joseph Engineering Company, New York, New York; John K. Ruff Company, Baltimore, Maryland; Glenwood Range Company, Taunton, Massachusetts; Advertising Metal Display Company, Chicago, Illinois; Forse Corporation, Anderson, Indiana, and Norcor Manufacturing Company, Green Bay, Wisconsin, and other persons, partnerships and corporations too numerous to mention herein, as well as other persons, partnerships and corporations whose names are unknown to the Grand Jurors, and all of whom were of the class described in Paragraph I of this Count, by taking and attempting to take from the persons to be defrauded their money, property, and other things of value in the manner and by the means hereinafter set forth.

III

That the said scheme and artifice to defraud was to be that the defendants by the use of false and fraudulent pretenses, representations and promises, and by the use of other trickery, would obtain from the persons to be defrauded money, property and other things of value for initial payments on fees, alleged expenses and as security, by inducing the persons to be defrauded to believe that the defendants could and would cause to be procured for the persons to be defrauded (a) contracts from sponsoring corporations and other sources for the construction of houses and apartment buildings, the financing of which said houses and apartment buildings would be insured by the Federal Housing Administration; (b) contracts from sponsoring corporations and other sources for the excavation of basements and foundations for houses and apartment buildings, the financing of which would be insured by the Federal Housing Administration; (c) contracts from sponsoring corporations and other sources for the construction, repair and remodeling of apartment buildings, office buildings and other buildings; (d) contracts from the War and Navy Departments of the United States, and from prime contractors who had secured such contracts, and from the Russian government through its purchasing agent, the Amtorg Trading Corporation, and from the American United Chemical Corporation, for the manufacture of shells, ammunition, bomb fuse

parts, and other kinds of materials used for the prosecution of warfare, and otherwise; (e) engineering services necessary to the construction of said houses, apartment buildings, hotel buildings, office buildings and other buildings, and (f) engineering services necessary to convert plants and factories to the manufacture of said shells, ammunition, bomb fuse parts, and other kinds of materials used for the prosecution of warfare and otherwise, and for the training of workers for the manufacture of said materials, which said contracts and engineering services were desired by the persons to be defrauded, whereas in truth and in fact, as the defendants then and there well knew, the defendants could not, would not, and did not cause to be procured for the persons to be defrauded such contracts and engineering services.

IV

That it was a part of said scheme and artifice to defraud that the defendants would cause to be organized Engineers' Group, Inc., and hold the same out to be a corporation duly incorporated under the laws of the state of Massachusetts.

V

That is was a further part of said scheme and artifice to defraud that the defendants, in the name of Engineers' Group, Inc., a Massachusetts corporation, would open, operate and maintain offices at 1022 Seventeenth Street, Northwest, Washington, District of Columbia; 24 School Street, Boston, Massachusetts, and 310 South Michigan Avenue, Chicago, Illinois, to which offices the persons to be defrauded were requested by the defendants to send their checks, drafts, notes and various communications, and where, among other places, the defendants would carry on their business.

VI

That it was a further part of said scheme and artifice to defraud that the defendants would take an active part in the management of the business of Engineers' Group, Inc., and in the solicitation of business for Engineers' Group, Inc.

## VII

That it was a further part of said scheme and artifice to defraud that the defendants, for the purpose of attaching an appearance of respectability and responsibility to Engineers' Group, Inc., and of lulling the persons to be defrauded into a sense of security and trust in their transactions with Engineers' Group, Inc.

(a) Would elect the defendant, James M. Curley, President and Director of Engineers' Group, Inc. and would represent to the persons to be defrauded that the said James M. Curley had been Governor of the State of Massachusetts and Mayor of the City of Boston, Massachusetts.

(b) Would elect the defendant, Marshall J. Fitzgerald, Secretary and Director of Engineers' Group, Inc., and would represent to the persons to be defrauded that the said Marshall J. Fitzgerald was an assistant to Louis Johnson, Assistant Secretary of War, to August 12, 1939.

(c) Would elect the defendant, James G. Fuller, Executive Vice President and Director of Engineers' Group, Inc., and would represent to the persons to be defrauded that the said James G. Fuller was the Chairman, Executive Committee, Amacuzac Power Commission, Mexico City, Mexico, and a director of other geographically and industrially diversified corporations, and was a trained engineer.

(d) Would elect the defendant, Donald Wakefield Smith, Treasurer, Vice President, Assistant Secretary and Director of Engineers' Group, Inc., and would represent to the persons to be defrauded that the said Donald Wakefield Smith was a former member of the National Labor Relations Board.

(e) Would elect the defendant, James Barton Underwood, President and Director of Engineers' Group, Inc., and would represent to the persons to be defrauded that the said James Barton Underwood was a retired Major of the United States Army and an expert in aviation and ordnance engineering.

(f) Would elect the defendant, Bert Hall, Vice President and Director of Engineers' Group, Inc., and would represent that the said Bert Hall, was a retired Major of the United States Army and an expert in aviation engineering.

VIII

That it was a further part of said scheme and artifice to defraud that the defendants would expend large and excessive funds for travel, hotel accommodations and long distance telephone calls, for the purpose of establishing a "front," or otherwise deluding and deceiving the persons to be defrauded, and of lulling them into a sense of security and trust in their transactions with Engineers' Group, Inc.

IX

That it was a further part of said scheme and artifice to defraud that the defendants would cause to be incorporated certain "dummy" corporations, including, among others, the Beverley Terrace Corporation, a Virginia corporation; the Colebrooke Housing Corporation, a Maryland corporation; the E. G. Corporation, a Virginia corporation, and Cumberland Properties, Inc., a Maryland corporation, which said corporations would pretend to act as sponsors for housing projects, the financing of which would be insured by the Federal Housing Administration.

X

That it was a further part of said scheme and artifice to defraud that the defendants would cause to be incorporated the American United Chemical Corporation, a Virginia corporation, for the purpose of negotiating with the persons to be defrauded for the manufacture of ammunition and other ordnance materials for the Amtorg Trading Corporation, a purchasing agency of the Russian government, and others.

XI

That it was a further part of said scheme and artifice to defraud that the defendants, for the purpose of inducing the persons to be defrauded to part with their money, property

and other things of value, would prepare and cause to be prepared, and would send and deliver and cause to be sent and delivered, through the United States mail and otherwise, to various departments and agencies of the United States Government, to the persons to be defrauded, and to others, certain typewritten brochures, prospectuses and financial statements of Engineers' Group, Inc., which said brochures, prospectuses and financial statements would contain certain false and fraudulent statements and representations which would be made with the knowledge that they were false and fraudulent and with conscious ignorance of and reckless indifference to truth or falsity, among which false and fraudulent statements and representations were the following, to wit:

(a) That the members, officers and directors of Engineers' Group, Inc., had personally planned and supervised over $100,000,000 worth of construction during the past 20 years; whereas in truth and in fact, as the defendants then and there well knew, the members, officers and directors of Engineers' Group, Inc. had supervised little, if any, construction work at any time.

(b) That the members, officers and directors of Engineers' Group, Inc. had more than 20 years' experience in engineering and construction work of every class and nature; whereas in truth and in fact, as the defendants then and there well knew, the members, officers and directors of Engineers' Group, Inc. had little, if any, experience in engineering and construction work of any class or nature.

(c) That the President of Engineers' Group, Inc., James M. Curley, had supervised over $500,000,000 of engineering and construction since 1932; whereas in truth and in fact, as the defendants then and there well knew, the said James M. Curley had supervised little, if any, engineering and construction work since 1932.

(d) That Engineers' Group, Inc. was well qualified, both by experience and through associate companies, to do general engineering and construction of any class and nature; whereas in truth and in fact, as the defendants then and

there well knew, Engineers' Group, Inc. had little, if any, experience in general engineering and construction work, and was not associated with any companies qualified and experienced in general engineering and construction work.

(e) That through its banking facilities Engineers' Group, Inc. was able to obtain accommodations up to $1,000,000 working capital; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. did not have any assets of any character, and did not have banking facilities which would enable them to borrow any substantial sum of money.

(f) That for more than 25 years associate engineering firms and contractors had been affiliated with Engineers' Group, Inc.; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. was organized only in June, 1941.

(g) That Engineers' Group, Inc. was consultant for a substantial number of construction, engineering and industrial companies and architects, including, among others, the following, to wit: Turgeon Construction Company, Providence, Rhode Island; Platt Contracting Company, Cambridge, Massachusetts; Wise Construction Company, Richmond, Virginia; W. H. Ellis & Sons, Boston, Massachusetts; M. Spinelli & Son, Boston, Massachusetts; Rahway Park Homes, Inc., Rahway, New Jersey; R. F. Pyle & Co., Hampton, Virginia; Virginia Engineering Co., Newport News, Virginia; Alan B. Mills, Washington, District of Columbia; W. B. Santmeyer, Washington, District of Columbia; E. Bradford Tazewell, Norfolk, Virginia; Guy B. Stephenson, Washington, District of Columbia; Industrial Gas Equipment Company, Philadelphia, Pennsylvania, and Hartford Electric Steel Co., Hartford, Connecticut; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. was not consultant for any of said construction, engineering and industrial companies and architects.

(h) That during the past 25 years Engineers' Group, Inc., or its members, had executed and completed many

large and important construction projects in the United States, South America and Europe, including, among others, the following, to wit: piers and warehouse, Boston, Massachusetts; high speed railroad, Pontiac and Detroit, Michigan; pier and harbor, Barranquilla, Columbia, South America; pier and harbor, Caracas, Ven-zuela, South America; irrigation project, Greece, and pipe line and oil refinery, Italy; whereas in truth and in fact, as said defendants then and there well knew, Engineers' Group, Inc. had only been in existence since June, 1941, and had not executed or completed any large and important construction project, or any kind of a project, in the United States, South America or Europe, or any other place; and none of the members of Engineers' Group, Inc. had executed and completed any of the projects herein set forth.

(i) That Engineers' Group, Inc. had construction awards totaling about 800 F. H. A. houses, located in Rhode Island, Maryland, District of Columbia and Virginia, in the total amount of $4,000,000; whereas in truth and in fact, as the defendants then and there well knew, no construction award of any kind or amount had been awarded Engineers' Group, Inc.

(j) That Engineers' Group, Inc. had under construction a gaseous oxygen plant for the General Electric Company at Schenectady, New York, and alumina and aluminum plants for Kalunite, Inc.; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc., did not then, or at any other time, have under construction any of the said plants.

(k) That Engineers' Group, Inc. had an Advisory Board consisting of well-known persons, including, among others, the following, to wit: C. D. Kuck, Vice President, Reynolds Metal Corporation, Richmond, Virginia; George H. Eichelberger, Chairman of the Board of Directors of the Translux Corporation, and Director of the General Cigar Company, New York, New York; C. A. Brown, President of the Risemann Magneto Corporation, New York, New York; Colonel W. A. Anderson, Chief Consultant, United States Maritime Commission, Washington, District of Columbia; How-

ard Whitman, Boston, Massachusetts, and Captain B. B. Brookes, Glen L. Martin Airplane Company, Baltimore, Maryland; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. did not have an Advisory Board and none of the persons listed as being members of such purported Board had agreed to serve, or knew that their names were being used for such purpose.

(l) That Engineers' Group, Inc. was organized and coordinated to undertake and complete various types of construction projects, and to furnish the necessary skilled and common labor through its superintendents; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. was not organized and coordinated to undertake and complete various types of construction projects, but on the contrary was not organized or coordinated in any manner whatsoever for such purposes, and did not have any superintendents and could not furnish skilled and common labor through its superintendents.

(m) That Engineers' Group, Inc. was the owner of stock in a number of newly formed corporations, including, among others, the following, to wit: Beverley Terrace Corporation, Cumberland Properties, Inc., Conway Housing Corporation, E. G. Corporation, Colebrooke Housing Corporation, Suitland Housing Corporation, and Edgewater Apartment Housing Corporation; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. did not own stock in any of said corporations.

(n) That Engineers' Group, Inc. held options to purchase many large and well-known contracting and industrial companies, including, among others, the following, to wit: Industrial Gas Equipment Co., Philadelphia, Pennsylvania; Glenwood Range Company, Taunton, Massachusetts; J. W. Bishop Company, Worcester, Massachusetts; Turgeon Construction Company, Providence, Rhode Island; Schweers and Smith, Inc., New York, New York; Triton Powder Company, Delaware and New Jersey; Key West Construction Company, New York, New York; Joseph

Engineering Corporation, New York, New York, and Justin C. O'Brien Company, Inc., New York, New York; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. did not hold options to purchase any of said contracting and industrial companies.

(o) That Engineers' Group, Inc. had issued $20,000 paid up common stock; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. had never issued or sold any stock of any kind.

(p) That Engineers' Group, Inc. had a surplus of $225,349.20 as of October 14, 1941, which said surplus included $35,860 subject to return and to certain adjustments if some of the projects were rejected; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. did not have a surplus in any amount as of October 14, 1941, but on the contrary was indebted to many of the persons to be defrauded for failure to return initial payments made by such persons.

(q) That Engineers' Group, Inc. had an income of $264,935.24 as of October 14, 1941, which said income was subject to adjustment if some of the projects were rejected; whereas in truth and in fact, as the defendants then and there well knew, the only income Engineers' Group, Inc. had received as of October 14, 1941, was initial payments made by the persons to be defrauded and which payments were subject to return to the persons to be defrauded, and which payments aggregated an amount not exceeding $50,000.

## XII

That it was a further part of said scheme and artifice to defraud that the defendants would induce and attempt to induce the persons to be defrauded to part with their money, property and other things of value, by means of telephone conversations, personal solicitations, letters, written agreements and other writings, both personally and through their agents, which telephone conversations, personal solicitations, letters, written agreements and other writings would consist of certain false and fraudulent representations and promises which would be made with the

knowledge that they were false and fraudulent and with conscious ignorance of and in reckless indifference to truth or falsity, among which statements, representations and promises were the following, to wit:

(a) That the defendants had influence with the Federal Housing Administration which would enable them to obtain the approval of housing projects and commitments thereon; whereas in truth and in fact, as the defendants then and there well knew, they did not have such influence with such Administration.

(b) That Engineers' Group, Inc. had been designated by the Federal Housing Administration as its agent for the placing of housing contracts in the District of Columbia; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. had not been designated by such Administration as its agent to place housing contracts in the District of Columbia.

(c) That Engineers' Group, Inc. and the sponsoring corporations hereinabove set forth, had secured and could secure the approval of the Federal Housing Administration for housing projects, and had secured and could secure the necessary financial commitments thereon, if the persons to be defrauded would make initial payments for fees; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. and said sponsoring corporations had not secured the approval of the Federal Housing Administration for housing projects and the necessary financial commitments thereon, and the Federal Housing Administration would not approve any project sponsored by said sponsoring corporations and Engineers' Group, Inc. because of the lack of housing and construction experience by the members of such corporations and Engineers' Group, Inc.

(d) That the approval of the Federal Housing Administration of housing projects had not been secured because of delays in the office of the Federal Housing Administration, and that such approval would be secured in a short time; whereas in truth and in fact, as the defendants then and there well knew, the failure to receive the approval of

the Federal Housing Administration was not caused by delay in the office of such Administration but because Engineers' Group, Inc. and the sponsoring corporations aforesaid were not competent to secure such approval.

(e) That Engineers' Group, Inc. could secure for certain persons to be defrauded, upon the payment of an initial fee to be held as security, contracts for the construction of an office building to be known as the Hamilton National Bank Project, Washington, District of Columbia, from the Road Builders Corporation of the District of Columbia; that the construction of said building had been approved by the District Commission, and that commitments had been made thereon; whereas in truth and in fact, as the defendants then and there well knew, the Road Builders Corporation of the District of Columbia did not exist, and commitments had not been made.

(f) That initial payments made by the persons to be defrauded to Engineers' Group, Inc. on account of fees to be charged in connection with the securing of housing and other building contracts and the furnishing of engineering services by Engineers' Group, Inc. would be held by Engineers' Group, Inc. as security; whereas in truth and in fact, as the defendants then and there well knew, said initial payments would not be and were not retained by Engineers' Group, Inc. as security but were immediately spent and dissipated.

(g) That Engineers' Group, Inc. had over $60,000 in the bank; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. never had more than $10,296.26 on deposit in the bank at any one time during the period of its existence.

(h) That Engineers' Group, Inc. had the sum of $10,000 on deposit with the Pilgrim Trust Company of Boston, Massachusetts; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. never had an account at said Pilgrim Trust Company.

(i) That Engineers' Group, Inc. owned the Cumberland Project property outright and that said property was worth

at least $50,000; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. did not own such property.

(j) That Engineers' Group, Inc. had a very competent board of engineers consisting of from 20 to 30 ex-officers of the United States Army, including ballistic and ordnance experts; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. did not have a board of engineers.

(k) That Engineers' Group, Inc. had surveyed the departments of the Willys-Overland Company, and had done considerable work for said company, and was representing said company in placing contracts; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. had not surveyed the departments of Willys-Overland Company, had not done any work for such company, and did not represent said company in placing contracts.

(l) That Engineers' Group, Inc. was working through the Army to speed up the manufacture of war items; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc., was not working through the Army to speed up the manufacture of war items, or for any other purpose.

(m) That Engineers' Group, Inc. had the necessary engineering staff and facilities to furnish the necessary engineering services in connection with the construction of houses, apartment buildings, hotel buildings, office buildings and other buildings, and to convert manufacturing plants and factories to the manufacture of shells, ammunition, bomb fuse parts and other kinds of material used for the prosecution of warfare and otherwise, and for the training of workers for the manufacture of said materials; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. did not have such personnel and facilities and did not have any facilities whatsoever adequate to furnish such services.

(n) That Engineers' Group, Inc. had obtained contracts for several companies, including, among others, the Forse

Corporation, the Glenwood Range Company, and the Norcor Company; whereas in truth and in fact, as the defendants then and there well knew, Engineers' Group, Inc. had not obtained contracts for any of said companies.

(o) That the initial payments and advance fees made by the persons to be defrauded to Engineers' Group, Inc. would be refunded by Engineers' Group, Inc. should the persons to be defrauded fail to receive contracts and engineering services within certain specified periods of time; whereas in truth and in fact, as the defendants then and there well knew, such payments and advance fees could not and would not be refunded.

And the Grand Jurors, on their oaths aforesaid, do further find and present that the defendants James G. Fuller, Donald Wakefield Smith, James Barton Underwood, James M. Curley, Marshall J. Fitzgerald, Bert Hall and David E. Desmond so having devised and intended to devise the aforesaid scheme and artifice to defraud and for obtaining money, property and other valuable things by means of the false and fraudulent pretenses, representations and promises heretofore described, on or about the 7th day of September, 1941, at Washington, District of Columbia, and within the jurisdiction of this Court, for the purpose of executing said scheme and artifice to defraud and effecting the object thereof and attempting so to do, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in an authorized depository for mail matter of the United States to be sent and delivered by the post office establishment of the United States to the addressee thereof a certain writing enclosed in a postpaid envelope addressed to Mr. F. M. Gifford, J. W. Bishop Company, Worcester, Mass., said writing being in substance and effect as follows, to wit:

7 September 1941

Mr. F. M. Gifford
J. W. Bishop Company
Worcester, Mass.
Dear Mr. Gifford:

Attached hereto are four (4) copies of the contract between J. W. Bishop Company and E-G Corporation,

covering construction at "Alexandria Village," which have been executed by our Vice-President. Will you please have these executed on behalf of your company and return two copies to us, retaining the other two for your files?

Also attached are two sets of blueprints and specifications for this project. We are obtaining a third set, which we shall forward to you tomorrow.

Very truly yours,

Engineers' Group, Inc.
James Fuller
Executive Vice-President.

ehc
Enc. (8)

against the peace and dignity of the United States and contrary to the form of the statute of the United States in such cases made and provided (18 U.S.C. 338).

COUNT TWO

And the Grand Jurors, upon their oaths aforesaid, do further find and present that the defendants James G. Fuller, Donald Wakefield Smith, James M. Curley, James Barton Underwood, Marshall J. Fitzgerald, Bert Hall and David E. Desmond so having devised and intended to devise the scheme and artifice to defraud and for obtaining money, property and other valuable things by means of the false and fraudulent pretenses, representations and promises described in the First Count of this indictment, the allegations concerning which said First Count are incorporated herein by reference thereto in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice to defraud and effecting the object thereof and attempting so to do, on or about the 7th day of September, 1941, at Washington, District of Columbia, and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in an authorized depository for mail matter of the United States to be sent and delivered by the post office establishment of the United States to the addressee thereof a certain writing enclosed in a postpaid envelope addressed to Mr. William

P. Haskell, Vice President, Schweers & Smith, Inc., 5 East 44th Street, New York, New York, said writing being in substance and effect as follows, to wit:

7 September 1941

Mr. William P. Haskell
Vice President
Schweers & Smith, Inc.
5 East 44th Street
New York, N. Y.

*Re: Colebrooke Housing Project*

Dear Bill:

After completing all the figures on the above today, the total sub-bids, including supervision, amount to $3,724.00 per family unit. Allowing for the $300.00 profit each, makes a total of $4,024.00, and I am including in the award a further $76.00, the disposition of which we will agree to. So, when you receive the construction award attached to the CM-2 standard plans and specifications on a multiple of the first two units, amounting to 50 houses, they will be awarded to you on the basis of $4,100 per house, including the above referred to $76.00.

However, if we do not agree upon its disposition, it is too late after you receive the award for me to take it back. But feeling the closeness of our relationship, I do not hesitate to advise the company to make the award including this sum.

I believe it would be advisable for you and your associates to wait until your late mail comes in, because I will send everything airmail, special delivery, from the airport post office tomorrow morning.

Cordially yours,

Engineers' Group, Inc.
James Fuller
Executive Vice-President.

JF:ehc

against the peace and dignity of the United States and contrary to the form of the statute of the United States in such cases made and provided (18 U.S.C. 338).

COUNT THREE

And the Grand Jurors, upon their oaths aforesaid, do further find and present that the defendants James G. Fuller, Donald Wakefield Smith, James Barton Underwood, James M. Curley, Marshall J. Fitzgerald, Bert Hall and David E. Desmond so having devised and intended to devise the scheme and artifice to defraud and for obtaining money, property and other valuable things by means of the false and fraudulent pretenses, representations and promises described in the First Count of this indictment, the allegations concerning which said First Count are incorporated herein by reference thereto in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice to defraud and effecting the object thereof and attempting so to do, on or about the 11th day of October, 1941, at Washington, District of Columbia, and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully and feloniously take and receive from the post office establishment of the United States certain writings, which said writings were enclosed in a postpaid envelope addressed to Mr. James Fuller, Engineers Group, Inc., 1022 17th Street N. W., Washington, D. C., which said writings and envelope had theretofore been deposited in an authorized depository of the United States for mail matter and had been sent and delivered by said post office establishment as directed, and said writings being in substance and effect as follows, to wit:

Glenwood Range Company

Taunton, Massachusetts

October 10, 1941.

Mr. James Fuller
Engineers Group, Inc.
1022—17 Street, N. W.

DEAR MR. FULLER:

This letter will confirm the arrangements discussed with you by our Mr. Malcolm Leach yesterday and during today's telephone conversation.

It is agreed that your company has been hired as consulting engineers to assist us in obtaining additional work for our factory.

We are enclosing our check for five thousand dollars ($5,000) as your retaining fee. We will pay you 2% of the gross business on any orders that originate through your office. This fee is to be adjusted in six months' time—either up or down—depending upon the amount of business taken during that period—or returned to us in the event that no business is secured.

I want to thank you for the time given to Mr. Leach yesterday, and I trust that I shall have the pleasure of meeting you personally in the very near future.

Very truly yours,

s/ WILBUR E. FORBES,
*Vice-President.*

HRC
Enclosure—

Enclosure

Glenwood Range Company

Taunton, Massachusetts

October 10, 1941.

To Whom It May Concern:

We wish to state that the firm of Engineers Group, Inc. is hereby authorized to represent us in any transactions or dealings with the Federal Government in the obtaining of contracts for our company.

GLENWOOD RANGE COMPANY,
s/ WILBUR E. FORBES,
*Vice-President.*

WEF-HRC

against the peace and dignity of the United States and contrary to the form of the statute of the United States in such cases made and provided (18 U. S. C. 338).

Count Four

And the Grand Jurors, upon their oaths aforesaid, do further find and present that the defendants James G.

Fuller, Donald Wakefield Smith, Marshall J. Fitzgerald, James Barton Underwood, James M. Curley, Bert Hall and David E. Desmond so having devised and intended to devise the scheme and artifice to defraud and for obtaining money, property and other valuable things by means of the false and fraudulent pretenses, representations and promises described in the First Count of this indictment, the allegations concerning which said First Count are incorporated herein by reference thereto in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice to defraud and effecting the object thereof and attempting so to do, on or about the 21st day of October, 1941, at Washington, District of Columbia, and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully and feloniously take and receive from the post office establishment of the United States a certain writing, which said writing was enclosed in a postpaid envelope addressed to Engineers' Group, Inc., 1022—17th Street, N. W., Washington, D. C., which said writing and envelope had theretofore been deposited in an authorized depository of the United States for mail matter and had been sent and delivered by said post office establishment as directed, and said writing being in substance and effect as follows, to wit:

Anthony C. La Rocca, Inc.

Contractors

55 West 42nd Street

New York City

Lackawanna 4-9469

October 20, 1941.

Engineers' Group, Inc.,
1022—17th Street, N. W.
Washington, D. C.

Attn. Mr. James Fuller, Executive Vice Pres.

Re: Detroit Project

GENTLEMEN:

This will acknowledge blue prints of typical floor plan and plot diagram of proposed apartment development, Detroit.

We desire a complete set of plans and detailed set of specifications for the above job.

Your prompt attention in this matter will be greatly appreciated.

Very truly yours,

KEY WEST CONSTRUCTION CORP.,
By s/ ANTHONY C. LaROCCA,
*Treas.*

ALR:H
cc.
Rayford W. Alley
William F. Walsh

against the peace and dignity of the United States and contrary to the form of the statute of the United States in such cases made and provided (18 U. S. C. 338).

Count Five

And the Grand Jurors, upon their oaths aforesaid, do further find and present that the defendants James G. Fuller, Donald Wakefield Smith, Marshall J. Fitzgerald, James Barton Underwood, James M. Curley, Bert Hall and David E. Desmond so having devised and intended to devise the scheme and artifice to defraud and for obtaining money, property and other valuable things by means of the false and fraudulent pretenses, representations and promises described in the First Count of this indictment, the allegations concerning which said First Count are incorporated herein by reference thereto in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice to defraud and effecting the object thereof and attempting so to do, on or about the 23rd day of October, 1941, at Washington, District of Columbia, and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in an authorized depository for mail matter of the United States to be sent and delivered by the post office establishment of the United States to the addressee thereof a certain writing enclosed in a postpaid envelope addressed to Mr. Anthony C. LaRocca, Treasurer, Key West Construction Corporation, 55 West 42nd Street, New York, N. Y., said writing being in substance and effect as follows, to wit:

23 October 1941.

Mr. Anthony C. LaRocca, Treasurer
Key West Construction Corporation
55 West 42nd Street
New York, N. Y.

DEAR TONY:

In confirmation of our telephone conversation of yesterday, the Cumberland Housing Project is approved by the FHA as to sub-division, planning, architecture and specifications on dwellings and as to plot plan layout. It also is approved to receive priority with a rating so no unjust restrictions shall be incurred during the course of construction. However, the forms for allocation and priorities to the FHA have not been received by them as yet and it is unwise (which we have learned from experience) to accept commitments without simultaneously receiving material releases by priority and allocation.

We were promised these a week ago last Monday, but I believe it will probably be next Monday, Tuesday, or Wednesday before we receive them.

Regarding the Norfolk project, we have not made a move on this yet because at the time of entering into the tentative agreement with you the FHA had approved it under Title VI, Emergency Defense Housing, and whenever we receive the approval on the Cumberland job we will then ask for the Norfolk release.

As to the Detroit job, enclosed herewith are two sets of drawings, and we have not received the detailed specifications. However, at this writing I have requested specifications as to the work that must be done, divided up in the trades, and the drawings that correspond to those specifications. I am advised that such details will take five or six days work of two men, and Hohauser and Cooper Engineering have agreed to have this ready for us for mailing special delivery Wednes-

day of this coming week. Therefore, we shall have the specifications and plans in detail for you by Thursday morning, one week today.

Also enclosed at that time will be the original plans and by comparing the detailed plans and specifications as to trades involved in the completion of the project with the original plans of the structure so far completed you will have complete knowledge of the job to be undertaken.

The delays in any of these jobs are not conditions originating directly or indirectly with the project as a whole, the sponsors, the architects, the engineers, the contractors, the sub-contractors, nor with any legal matters pertaining to them or to it, nor any personnel troubles pertaining to them or to it, nor financial conditions.

The trouble is due to the changes having taken place in the past three weeks regarding defense housing, which entails all the departments of the Office of Production Management (OPM), the Defense Housing Corporation (DHC) and the Federal Housing Administration (FHA);—they are doing their best and have no motives other than to expedite all the contracts for insurance that are placed with them for certified defense areas.

Very cordially yours,

Engineers' Group, Inc.
James Fuller
Executive Vice-President

JF:EHC
Enc (2)
cc: R. W. Alley
W. F. Walsh

against the peace and dignity of the United States and contrary to the form of the statute of the United States in such cases made and provided (18 U.S.C. 338).

Count Six

And the Grand Jurors, upon their oaths aforesaid, do further find and present that the defendants James G. Fuller, Donald Wakefield Smith, Marshall J. Fitzgerald, James Barton Underwood, James M. Curley, Bert Hall and David E. Desmond so having devised and intended to devise the scheme and artifice to defraud and for obtaining money, property and other valuable things by means of the false and fraudulent pretenses, representations and promises described in the First Count of this indictment, the allegations concerning which said First Count are incorporated herein by reference thereto in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice to defraud and effecting the object thereof and attempting so to do, on or about the 6th day of November, 1941, at Washington, District of Columbia, and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in an authorized depository for mail matter of the United States to be sent and delivered by the post office establishment of the United States to the addressee thereof a certain writing enclosed in a postpaid envelope addressed to Mr. William P. Haskell, Vice President, Schweers and Smith, Inc., 5 West 44th Street, New York, N. Y., said writing being in substance and effect as follows, to wit:

6 November 1941

Mr. William P. Haskell
Vice President
Schweers and Smith, Inc.
5 East 44th Street
New York, N. Y.

Dear Bill:

Received your letter of November 3. I have no doubt that November 12 will be a satisfactory date, since my personal meeting with the Regional District of the FHA having brought considerable results. I should have

been in conference with them probably a few weeks back, and we would have all the shovels in the ground at this time.

As I am leaving today for the West, and due to the President of the bank being away, it will probably be the first part of the week before I can conclude the negotiations discussed with you here and in Boston.

Sincerely yours,

Engineers' Group, Inc.
James Fuller
Executive Vice President

JF:ehc

against the peace and dignity of the United States and contrary to the form of the statute of the United States in such cases made and provided (18 U.S.C. 338).

Count Seven

And the Grand Jurors, upon their oaths aforesaid, do further find and present that the defendants James G. Fuller, Donald Wakefield Smith, Marshall J. Fitzgerald, James Barton Underwood, James M. Curley, Bert Hall and David E. Desmond so having devised and intended to devise the scheme and artifice to defraud and for obtaining money, property and other valuable things by means of the false and fraudulent pretenses, representations and promises described in the First Count of this indictment, the allegations concerning which said First Count are incorporated herein by reference thereto in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice to defraud and effecting the object thereof and attempting so to do, on or about the 28th day of November, 1941, at Washington, District of Columbia, and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in an authorized depository for mail matter of the United States to be sent and delivered by the post office establishment of the United States to the addressee thereof a certain writing enclosed in a postpaid envelope addressed to

Glenwood Range Company, Taunton, Massachusetts, said writing being in substance and effect as follows, to wit:

ENGINEER'S GROUP, INC.
Boston, Massachusetts

Reply to:
1022-17th St. N.W.
Washington, D. C.

28 November 1941

Glenwood Range Company
Taunton, Massachusetts.

Attn: Messrs. Malcolm Leach and Wilbur Forbes

Gentlemen:

Enclosed you will find the following exhibits:

1)—Copy of Organization Analysis compiled as of September 24, 1941.

2)—Copy of letter of supplemental filing (Glenwood Range Company and Fells Plumbing & Heating Company accounts)

3)—Financial statement as of October 14, 1941.

4)—Photostat copy of an acknowledgment of supplemental filing.

I will send to you on or about December 10, Financial Statement as of December 1 or 2.

One of our most successful negotiations has been with Kalunite, Inc., Salt Lake City, Utah. This company is one of the five companies named by the U. S. Government to have the aluminum business of America:—Alcoa; Union Carbide & Carbon; Reynolds Metals Company; Bohn Aluminum & Brass; Kalunite, Inc. The Kalunite company was a tough job for anybody in America to accomplish because they never produced

alumina in the orthodox manner such as is known to the industry of aluminum. They had a patented process proven in a pilot plant (never commercially) to process clays other than bauxite and produce alumina, the product that aluminum is manufactured from.

A direct reference on this account is Frank Eichelberger, M.E., E.E., Ch.E., a director and officer of many companies, and is President of Kalunite, Inc.

The second reference would be Reynolds Metals Company, Richmond, Va., Mr. C. D. Kuck, Vice President (also Chairman of the Federal Control Board of the RFC, said Control Board being in charge of plants financed under the Defense Program by the RFC). In this particular instance, we have created a corporation on Reyn-O-Cell insulation, a product subsidized by the Surplus Commodity Corporation of the U. S. Government, being manufactured in many of their plants and distributed throughout the country.

A third reference would be the Eisemann Magneto Corporation, attention Mr. C. A. Brown. In this particular instance, this firm came to us with 30% nonessential business of plant capacity and frozen inventory of $396,000—total inventory $596,000—normal operating inventory $200,000. In analysis of this account (being a long story), the bottleneck appeared in twenty pounds of aluminum to be manufactured by Bohn Aluminum & Brass in Detroit on a special type machine that was in A-1-A priority, one of a battery of machines in defense line production. To use this machine would cause the battery—line production unit—to shut down for a period of forty hours to re-jig and tool and therefore carry the load of the balance of the battery line production as a cost. Although the total contract involved for this company with Bohn's order amounted to approximately $125, only $42 of material—the cost for this item was well over $20,000. We got the Government to assume this cost and thereby unfroze not only the abnormal inventory of Eisemann, but millions

of dollars of finished products that depended upon a magneto before utilization—such as Caterpillars, tanks and other tractors.

Further, our recommendations, policy and procedure with the Eisemann company (which were followed to the letter) converted the certificate of necessity with a higher priority rating to include approximately 95% of non-essential business, so that the firm today is operating normally from an inventory standpoint and on about 95-96% of total capacity as essential products.

We are now handling another of their products, which the Navy has approved and accepted, along with Buda Engineering Company, of Harvey, Ill., and within 90 to 100 days this product should be produced in large volume to $300,000 per month. Mr. Brown is President of Eisemann.

I am not touching on other diversifications of our efforts since they do not pertain directly to our negotiations in your line of endeavor; and I believe that if you will address a letter to the respective parties of the above three important business of the United States, their replies as to their relationships and negotiations with Engineers' Group, Inc. and the writer, and as to our integrity and ability to perform, will satisfy you that the confidence you have extended to us has been well placed.

Our major bank account is carried with the Pilgrim Trust Company, in Boston. This is practically inactive, since our active account is carried in the National Metropolitan Bank, Washington, D. C. Inasmuch as our statement looks very strong and healthy, I do not want this to mislead you. We are not as strong as the intangibles herein disclosed purport. Our bank balance at the Pilgrim Trust is approximately $15,000, and our account at the National Metropolitan is approximately $1000 daily balance.

Hoping the enclosures will suffice to provide the information you desire, enabling you to approve the

proposal which we shall submit upon completion by Major Hawkins and his assistants of his survey, on the contemplated business with Amtorg; we are

Very cordially yours, Engineers' Group, Inc. (S.) James Fuller, Executive Vice President.

JF:ehc

against the peace and dignity of the United States and contrary to the form of the statute of the United States in such cases made and provided (18 U.S.C. 338).

Count Eight

And the Grand Jurors, upon their oaths aforesaid, do further find and present that the defendants, James G. Fuller, Donald Wakefield Smith, Marshall J. Fitzgerald, James Barton Underwood, James M. Curley, Bert Hall and David E. Desmond so having devised and intended to devise the scheme and artifice to defraud and for obtaining money, property and other valuable things by means of the false and fraudulent pretenses, representations and promises described in the First Count of this indictment, the allegations concerning which said First Count are incorporated herein by reference thereto in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice to defraud and effecting the object thereof and attempting so to do, on or about the 29th day of November, 1941, at Washington, District of Columbia, and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully and feloniously take and receive from the post office establishment of the United States a certain writing, which said writing was enclosed in a postpaid envelope addressed to Engineers' Group, Inc., 1022-17th St. N. W., Washington, D. C., which said writing and envelope had theretofore been deposited in an authorized depository of the United States for mail matter and had been sent and delivered by said post office establishment as directed, and

said writing being in substance and effect as follows, to wit:

JOHN K. RUFF Co.

Contractors—Builders

100 West 22nd Street
(Seal) Baltimore, Maryland
University 8300

November 28th, 1941

Re: Housing Project Alexandria, Va.

Engineers' Group
1022-17th St. N. W.
Washington, D. C.

Att: Mr. J. Fuller

Dear Sir:

We wish to acknowledge receipt of your letter of November 26th in which you forwarded set of plans for an individual house to take the place of the one forwarded us previously.

We are looking forward to receiving the specifications referred to in your letter.

We are making a survey and cost analysis of these jobs in order to determine what we consider the proper price on these buildings, so that we will be in a position to check the estimate of the general subcontractor that you will furnish.

Thanking you very kindly, we are

Yours very truly,

JOHN K. RUFF COMPANY,
(S.) JOHN K. RUFF.

John K. Ruff.
dl.

against the peace and dignity of the United States and contrary to the form of the statute of the United States in such cases made and provided (18 U. S. C. 338).

Count Nine

And the Grand Jurors, upon their oaths aforesaid, do further find and present that the defendants James G. Fuller, Donald Wakefield Smith, Marshall J. Fitzgerald, James Barton Underwood, James M. Curley, Bert Hall, and David E. Desmond so having devised and intended to devise the scheme and artifice to defraud and for obtaining money, property and other valuable things by means of the false and fraudulent pretenses, representations and promises described in the First Count of this indictment, the allegations concerning which said First Count are incorporated herein by reference thereto in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice to defraud and effecting the object thereof and attempting so to do, on or about the 7th day of December, 1941, at Washington, District of Columbia, and within the jurisdiction of this Court, did wilfully, unlawfully and feloniously take and receive from the post office establishment of the United States a certain writing *writing,* which said writing was enclosed in a postpaid envelope addressed to Engineers' Group, Inc., 1022-17th Street, N.W., Washington, D. C., which said writing and envelope had theretofore been deposited in an authorized depository of the United States for mail matter and had been sent and delivered by said post office establishment as directed, and said writing being in substance and effect as follows, to wit:

John K. Ruff Co.

(Seal) Contractors Builders

100 West 22nd Street
Baltimore, Maryland
University 8300

December 6, 1941

Engineers Group, Inc.,
1022—17th Street, N. W.,
Washington, D. C.

Att: Mr. Fuller

Gentlemen:

Will you please advise by return mail when we may expect to receive the specifications for the Alexandria project.

Thanking you, we are

Very truly yours,

JOHN K. RUFF COMPANY,

(S.) JAMES A. DIXON.

James A. Dixon.

d.

against the peace and dignity of the United States and contrary to the form of the statute of the United States in such cases made and provided (18 U. S. C. 338).

Count Ten

And the Grand Jurors, upon their oaths aforesaid, do further find and present that the defendants James G. Fuller, Donald Wakefield Smith, Marshall J. Fitzgerald, James Barton Underwood, James M. Curley, Bert Hall and David E. Desmond so having devised and intended to devise the scheme and artifice to defraud and for obtaining money, property and other valuable things by means of the false and fraudulent pretenses, representations and promises described in the First Count of this indictment, the allegations concerning which said First Count are incorporated herein by reference thereto in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice to defraud and effecting the object thereof and attempting so to do, on or about the 2nd day of January, 1942, at Washington, District of Columbia, and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in an authorized depository for mail matter of the United States to be sent and delivered by the post office establishment of the United States to the addressee thereof, a certain writing enclosed in a postpaid envelope addressed to Mr. Rayford

W. Alley, 30 Broad Street, New York, N. Y., said writing being in substance and effect as follows, to wit:

2 January 1942.

Mr. Rayford W. Alley
30 Broad Street
New York, N. Y.

Dear Rayford:

We have been in constant communication, either by phone or personal contact, with your client, Anthony LaRocca, of Anthony C. LaRocca, Inc., and have tried to keep him advised as to the status of the different jobs concerning him and his associates; and, until catching up on this current correspondence, I did not know that Mr. LaRocca had not informed both you and Joseph Engineering Corporation.

We wish to state that prior to Christmas but since war was declared, the FHA advised Mr. Robertson and Mr. Newcomb, in charge of our contracting division, that they were endeavoring to complete all applications as of that date between January 6 and 15. It seems that war had to be declared before FHA gathered the importance of the needs and emergency in the areas of these projects of interest to you and your clients, as well as other areas.

Since being notified of the above, we are compelled to wait out this time. We believe the projects filed prior and up to December 22 will be processed by the FHA by that time from the evidence we now have at hand.

Since December 22, we have received two projects. One was a very complicated situation. Colebrooke has been processed by the FHA several weeks ago under Title II in multiples of 25 houses each. We made application to put it under Title VI—emergency housing—and, although that has not been completed as yet, they have increased the multiples from 25 to 50 and eliminated conditional commitments to the extent that construction loans on the multiples of 50 houses are now available, enabling Schweers & Smith, Inc., to proceed soundly.

Even if the 130 houses of Colebrooke were approved under the emergency act and Title VI, Schweers & Smith could not proceed with a greater multiple than the fifty houses. Therefore, not anything is holding them back at this time. Mr. Haskell has informed me that they are starting to work the fifth or sixth of January.

E-Gee Corporation came out day before yesterday. This is a project in Alexandria and is adjacent to Beverly Terrace. I received the wire on this project while in New York and contacted Mr. LaRocca New Year's Eve at the Roosevelt Hotel. I thought the project concerned in the wire was one of his, but find it to be the above, which is a Massachusetts contractor. This is a Title VI emergency act project.

The above will bear out that our applications are in proper form, that our corporation is in good standing and that the area we are operating in is receiving serious attention; and we therefore believe that the balance of our projects will be concluded in the very near future, to the extent that all contractors with whom we have negotiations will be able to proceed with their construction awards.

I am sorry you could not join my family for a New Year's wish, even though I had to work, and I anticipate seeing you in the very near future.

Very cordially yours,

ENGINEERS' GROUP, INC.,
JAMES FULLER,
*Executive Vice President.*

JF:ehc

cc: Anthony C. LaRocca
Key West Constr. Co.
Joseph Engineering Corp.
Walsh and Levine.

Season's Greetings

against the peace and dignity of the United States and contrary to the form of the statute of the United States in such cases made and provided (18 U. S. C. 338).

Count Eleven

And the Grand Jurors, upon their oaths aforesaid, do further find and present that the defendants James G. Fuller, Donald Wakefield Smith, James Barton Underwood, James M. Curley, Marshall J. Fitzgerald, Bert Hall and David E. Desmond so having devised and intended to devise the scheme and artifice to defraud and for obtaining money, property and other valuable things by means of the false and fraudulent pretenses, representations and promises described in the First Count of this indictment, the allegations concerning which said First Count are incorporated herein by reference thereto in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice to defraud and effecting the object thereof and attempting so to do, on or about the 14th day of January, 1942, at Washington, District of Columbia, and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully and feloniously take and receive from the post office establishment of the United States a certain writing, which said writing was enclosed in a postpaid envelope addressed to Engineers Group, Inc., 1022—17th St., N. W., Washington, D. C., which said writing and envelope had theretofore been deposited in an authorized depository of the United States for mail matter and had been sent and delivered by said post office establishment as directed, and said writing being in substance and effect as follows, to wit:

Forse Corporation
Anderson, Indiana

Lettergram

*Please Give this Letter Preferred Attention*

AIR MAIL Jan. 13, 1942.

Engineers Group, Inc.
1022—17th St., N.W.
Washington, D. C.

Attention: James Fuller

Dear Jim:

We are enclosing the check and the new note as you requested, and wired you as follows:

"SENDING SEVEN FIFTY AND NOTE AIRMAIL NOW ITS YOUR TURN."

I think you'll agree, Jim, we're trying to do everything we can to help you and in return I know you're going to do your utmost to speed things up for us. We're really serious about this thing and want to get started just as quickly as possible.

I think you'll be remarkably well pleased when we get into action on any job that we're given because you'll find we do things quicker and more efficiently than a larger organization because we've had to be resourceful and flexible in operation over these many years.

Don't forget also, Jim, that you expected to send another proposal to us today that might fit into that small tool room. Also, if you expect to have considerable quantity of tool work in getting started up there at Toledo, we'd like to have a chance to figure on it down here.

In other words, I imagine you'll have 15,000 or 20,000 hours in a tool room and if we could work an arrangement down here that would get us say $4.00 an hour or so for the tool work, I think you'd find we could do a swell job, also.

This plant the other day turned out a special grinding job for Guide Lamp Corporation in eighteen hours that they couldn't get done anywhere else in less than a week. It's typical of the flexibility of the organization and I'd like to take it over if it can be done in a manner that would be mutually helpful.

I believe also that this other little production job could be fitted into the same shop and we can work something out. In other words, send everything you can to us that you think we could fit in—even if you

have any doubt about it, send it along because we may have something in mind that can be worked out that we haven't even thought about before.

Hope you had a pleasant trip back and if the flying weather is as good from Pittsburgh to Washington this morning as it is here, it should be one of the usual on-time schedules.

Cordially yours,

FORSE CORPORATION.
(S.) DON F., *Pres.*

H. Don Forse.
AW.

P. S.—Give my regards to Major Hall and Major Underwood.

against the peace and dignity of the United States and contrary to the form of the statute of the United States in such cases made and provided (18 U. S. C. 338).

Count Twelve

And the Grand Jurors, upon their oaths aforesaid, do further find and present that the defendants James G. Fuller, Donald Wakefield Smith, James Barton Underwood, James M. Curley, Marshall J. Fitzgerald, Bert Hall and David E. Desmond so having devised and intended to devise the scheme and artifice to defraud and for obtaining money, property and other valuable things by means of the false and fraudulent pretenses, representations and promises described in the First Count of this indictment, the allegations concerning which said First Count are incorporated herein by reference thereto in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice to defraud and effecting the object thereof and attempting so to do, on or about the 7th day of November, 1941, at Washington, District of Columbia, and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully and feloniously take and receive from the post office establishment of the United States a certain writing, which said writing was enclosed in a postpaid envelope addressed

to Engineers' Group, Inc., 1022—17th St., N. W., Washington, D. C., Attention Mr. Fuller, which said writing and envelope had theretofore been deposited in an authorized depository of the United States for mail matter and had been sent and delivered by said post office establishment as directed, and said writing being in substance and effect as follows, to wit:

(Seal) Its name indicates its character

Agency of
The Lincoln National Life Insurance Company
Home Office
Fort Wayne, Ind.

Room 925—100 Milk Street
Boston, Massachusetts

Herbert W. Jackson
General Agent
Phone Hubbard 2490

Boston, Mass.
Nov. 6, 41.

Dear Jim:

Enclosed please find bank money order for twenty-five hundred dollars as per our phone conversation. Kindly mail the check you have from him to me at my home address. Have an appointment with him to be in your office on next Tuesday if you can not see us let me know and mail my check to the house and oblige.

As ever

(S.) Dave.

against the peace and dignity of the United States and contrary to the form of the statute of the United States in such cases made and provided (18 U. S. C. 338).

Count Thirteen

And the Grand Jurors, upon their oaths aforesaid, do further find and present that the defendants James G.

Fuller, Donald Wakefield Smith, James Barton Underwood, James M. Curley, Marshall J. Fitzgerald, Bert Hall and David E. Desmond so having devised and intended to devise the scheme and artifice to defraud and for obtaining money, property and other valuable things by means of the false and fraudulent pretenses, representations and promises described in the First Count of this indictment, the allegations concerning which said First Count are incorporated herein by reference thereto in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice to defraud and effecting the object thereof and attempting so to do, on or about the 19th day of January, 1942, at Washington, District of Columbia, and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in an authorized depository of the United States to be sent and delivered by the post office establishment of the United States to the addressee thereof a certain writing enclosed in a postpaid envelope addressed to Advertising Metal Display Co., 822 W. Washington Boulevard, Chicago, Illinois, Attn.: H. H. Krueger, President, said writing being in substance and effect as follows, to wit:

19 January 1942.

Advertising Metal Display Co.,
822 W. Washington Boulevard,
Chicago, Illinois

Attn.: H. H. Krueger, President

Re: Consulting Engineering Contract—Jan. 16, 1942

GENTLEMEN:

We have received your letter agreement covering the above and agree to the terms and conditions thereon set forth; and likewise acknowledge receipt of your check for $7,500.00.

We wish to confirm the understanding of Mr. Bemis and Mr. Williams, that in entering into this relationship with us there is no stipulated or implied obliga-

tion on your part to accept any business you may have proferred to you by us, and that you are to be the sole judge as to whether the business made available for you and offered by us is desirable and you have the privilege of declining any and all business.

Very truly yours,

ENGINEERS' GROUP, INC.,
JAMES FULLER,
*Executive Vice President.*

JF:ehc.

Co: Messrs. Williams & Englehardt, Chicago Office.

against the peace and dignity of the United States and contrary to the form of the statute of the United States in such cases made and provided (18 U. S. C. 338).

Count Fourteen

And the Grand Jurors, upon their oaths aforesaid, do further find and present that the defendants James G. Fuller, Donald Wakefield Smith, James Barton Underwood, James M. Curley, Marshall J. Fitzgerald, Bert Hall and David E. Desmond so having devised and intended to devise the scheme and artifice to defraud and for obtaining money, property and other valuable things by means of the false and fraudulent pretenses, representations and promises described in the First Count of this indictment, the allegations concerning which said First Count are incorporated herein by reference thereto in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice to defraud and effecting the object thereof and attempting so to do, on or about the 29th day of January, 1942, at Washington, District of Columbia, and within the jurisdiction of this Court, did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in an authorized depository of the United States to be sent and delivered by the post office establishment of the United States to the addressee thereof certain writings enclosed in a postpaid envelope addressed to Mr. L. B. Smith, President, Apco Mossberg Company, Attleboro,

Mass., said writings being in substance and effect as follows, to wit:

Engineers' Group Inc.,
1022 17th St., N. W.,
Washington, D. C.

Lettergram

*Please Give This Letter Preferred Attention*

January 29, 1942.

Mr. L. B. Smith, President,
Apco Mossberg Company,
Attleboro, Mass.

DEAR MR. SMITH:

Pursuant to your conversation with Mr. Fuller, we are sending you the enclosures, at his request.

Please sign and return the two heavy copies, one of which will be sent back to you and one placed in our files, after execution by our company. The third copy is for your records, pending receipt of the executed copy.

Very truly yours,

ENGINEERS' GROUP, INC.,
(S.) E. COOKSEY,
*Secretary to Mr. Fuller.*

enc.

(Enclosure)

APCO MOSSBERG COMPANY,

Attleboro, Massachusetts

January 29, 1942.

Mr. James Fuller,
Executive Vice President,
Engineers' Group, Inc.,
1022 17th Street, N. W.,
Washington, D. C.

DEAR MR. FULLER:

This will confirm the arrangements which we discussed with you today.

It is agreed that your company has been hired as Consulting Engineers to assist us in obtaining additional work for our plant.

We hand you herewith Nine Thousand Dollars ($9,000.00) as your retainer fee. It is understood that we will pay you eight per cent (8%) of the gross business on any orders acceptable to us that originate through your office.

It is further understood that the above mentioned retainer is to apply against said fee—which fee is to be adjusted in six months' time—either up or down—depending upon the amount of ousiness taken during that period. In the event that no business is secured, within the agreed six months, the retainer is to be returned to us in full.

Very truly yours,

APCO MOSSBERG COMPANY,

By :—— ——,

*President.*

Accepted:

ENGINEERS' GROUP, INC.,

By: —— ——,

*Exec. Vice Pres.*

(Enclosure)

APCO Mossberg Company,

Attleboro, Massachusetts

January 29, 1942.

To Whom It May Concern:

We wish to state that the firm of Engineers' Group, Inc. is hereby authorized to represent us in an engineering and technical capacity in any transactions or dealings with the Federal Government or subcontracting order with another corporation holding a Prime Contract.

APCO Mossberg Company,

By: —— ——,

*President.*

against the peace and dignity of the United States and contrary to the form of the statute of the United States in such cases made and provided (18 U. S. C. 338).

Count Fifteen

And the Grand Jurors, upon their oaths aforesaid, do further find and present that the defendants James G. Fuller, Donald Wakefield Smith, James Barton Underwood, James M. Curley, Marshall J. Fitzgerald, Bert Hall and David E. Desmond so having devised and intended to devise the scheme and artifice to defraud and for obtaining money, property and other valuable things by means of the false and fraudulent pretenses, representations and promises described in the First Count of this indictment, the allegations concerning which said First Count are incorporated herein by reference thereto in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice to defraud and effecting the object thereof and attempting so to do, on or about the 2nd day of February, 1942, at Washington, District of Columbia, and within the jurisdiction of this Court, did knowingly, wilfully, un-

lawfully and feloniously place and cause to be placed in an authorized depository of the United States to be sent and delivered by the post office establishment of the United States to the addressee thereof a certain writing enclosed in a postpaid envelope addressed to Mr. H. Don Forse, Forse Corporation, Anderson, Indiana, said writing being in substance and effect as follows, to wit:

February 2, 1942.

Mr. H. Don Forse,
Forse Corporation,
Anderson, Indiana

DEAR DON:

We have been advised today by the correspondence of General Credit, Inc., that they will not finance the machinery for your corporation (1) under your present attitude, and (2) with the figures of your financial statement submitted to them by you.

At the same time, we have received communication from the machinery people from whom we bought the equipment that you had rescinded my order of confirmation and made it subject to your inspection. Therefore, that equipment is not available for you.

We herewith advise you that it will be necessary for the Forse Corporation to purchase the equipment suggested by us namely:

2 6-spindle 1¼" National Acme, or
2 #2 Brown & Sharpe Modern Automatics (or two of any 6-spindle machine that has the equivalent of practical production)
2 High-speed Drill Presses—10,000 rpm.
2 Kick Presses

You will have to purchase and finance these machines yourself and it will have to be accomplished with confirmation of bill of lading, not later than Thursday morning, 12:00 Noon. Our office in Washington

will have to be advised of this procedure and accomplishment.

We have made awards of screw machine products to other companies and we have received not only the chattel on the machinery purchased for them, but the note of the corporation in addition, as collateral, made out in full, leaving off the date for confirmation.

The insinuation of outsiders telling you more about the contract than what has been told to you by Engineers' Group, Inc. would be superfluous for me to even remark about.

Upon receipt of this letter please advise us in writing what action you are going to take (do not telephone).

With kindest regards to Mr. Hamilton, we are

Very truly yours,

ENGINEERS' GROUP, INC.,
JAMES FULLER,
*Executive Vice President.*

JF:ehc.

against the peace and dignity of the United States and contrary to the form of the statute of the United States in such cases made and provided (18 U. S. C. 338).

Count Sixteen

And the Grand Jurors, upon their oaths aforesaid, do further find and present that the said James G. Fuller, Donald Wakefield Smith, James Barton Underwood, James M. Curley, Marshall J. Fitzgerald, Bert Hall and David E. Desmond, the defendants aforesaid, being hereinafter known and referred to as the defendants and conspirators, through a period of time commencing on or about the 20th day of June, 1941, and continuously thereafter up to and including the 28th day of February, 1942, at Washington, District of Columbia, and within the jurisdiction of this Court, and in the states of Massachusetts, New York, Rhode Island, Pennsylvania, Ohio, Michigan, Indiana and Illinois, and at various other places to the Grand Jurors unknown, did knowingly, wilfully, unlawfully and feloniously con-

spire, combine, confederate and agree together, and each with the other, to commit offenses against the United States, to wit, to knowingly, wilfully, unlawfully and feloniously violate Section 338, Title 18, United States Code, in this, that it was the purpose and object of the said conspiracy and of the defendants and conspirators, and each of them, to devise and intend to devise a scheme and artifice to defraud a certain class of persons more particularly described in the First Count of this indictment, and to obtain money, property and other things of value from said class of persons by means of false and fraudulent pretenses, representations and promises, more particularly described in the First Count of this indictment, and to unlawfully appropriate said money, property and other things of value so obtained to their, the defendants and conspirators, own uses, and for the purpose of executing and attempting to execute said scheme and artifice to defraud, to place and cause to be placed in authorized depositories for mail matter of the United States, to be sent and delivered by the post office establishment of the United States, letters, writings, brochures, prospectuses and financial statements, and to knowingly, unlawfully, wilfully and feloniously cause to be delivered by mail according to the direction thereon, letters, writings, brochures, prospectuses and financial statements, and to take and receive letters, writings, brochures, prospectuses and financial statements therefrom; the allegations of the First Count of this indictment descriptive of said scheme and artifice to defraud, and of said false and fraudulent pretenses, representations, statements, artifices, devices and acts, and the manner, means and purposes thereof and of the defendants and conspirators, and each of them, being hereby re-affirmed, re-alleged and incorporated herein as if herein set forth in full.

### Overt Acts

And the Grand Jurors, upon their oaths aforesaid, do further present and find that certain of the defendants and conspirators at the several times and places hereinafter mentioned, did and performed certain overt acts in pursuance of and in execution of and to effect and employ

and accomplish the objects, designs and purposes of the said wilful, unlawful and felonious conspiracy, combination, confederation and agreement that is to say:

1

On or about June 26, 1941, at Washington, District of Columbia, the defendant James G. Fuller, assumed the office of Executive Vice-President of Engineers' Group, Inc.

2

On or about June 26, 1941, at Washington, District of Columbia, the defendant Marshall J. Fitzgerald assumed the office of Secretary of Engineers' Group, Inc.

3

On or about June 26, 1941, at Washington, District of Columbia, the defendants James G. Fuller and Marshall J. Fitzgerald held a meeting at which it was agreed to rent an office for Engineers' Group, Inc., and to execute a lease therefor.

4

On or about July 1, 1941, at Washington, District of Columbia, the defendant James M. Curley accepted the office of and assumed to act as the President of Engineers' Group, Inc.

5

On or about August 1, 1941, at Washington, District of Columbia, the defendants James G. Fuller and Marshall J. Fitzgerald entered into a written lease on behalf of Engineers' Group, Inc., a Massachusetts corporation, for the premises known as 1022 17th Street, North West, Washington, District of Columbia.

6

On or about August 1, 1941, at Boston, Massachusetts, the defendant David E. Desmond introduced George L. Rocheford and George E. Rocheford to the defendant James M. Curley.

7

On or about August 1, 1941, at Boston, Massachusetts, the defendant James M. Curley introduced George L. Rocheford and George E. Rocheford to the defendant James G. Fuller.

8

On or about August 1, 1941, at Boston, Massachusetts, the defendants James G. Fuller, James M. Curley and David E. Desmond met and conferred with George L. Rocheford and George E. Rocheford.

9

On or about August 13, 1941, at Washington, District of Columbia, the defendants James G. Fuller, James M. Curley and David E. Desmond met and conferred with George L. Rocheford and George E. Rocheford.

10

On or about August 11, 1941, at Boston, Massachusetts, the defendants David E. Desmond and James M. Curley met and conferred with Frank M. Gifford.

11

On or about August 19, 1941, at Boston, Massachusetts, the defendants David E. Desmond and James M. Curley met and conferred with John W. Powers.

12

On or about August 20, 1941, at Washington, District of Columbia, the defendant David E. Desmond introduced John W. Powers to the defendant James G. Fuller.

13

On or about August 20, 1941, at Washington, District of Columbia, the defendants James G. Fuller and James M. Curley met and conferred with John W. Powers.

14

On or about August 10, 1941, at Washington, District of Columbia, the defendant James M. Curley received the sum of $3,500.00 from the defendant James G. Fuller.

15

On or about September 15, 1941, at Washington, District of Columbia, the defendant Marshall J. Fitzgerald met and conferred with Herbert E. Mitler.

16

On or about September 24, 1941, at Washington, District of Columbia, and at various times thereafter, the dates being to the Grand Jurors unknown, the defendant James G. Fuller prepared and distributed prospectuses, brochures and financial statements setting forth the officers, directors, business connections, experience and financial status of Engineers' Group, Inc.

17

On or about October 1, 1941, at Washington, District of Columbia, the defendants David E. Desmond and James G. Fuller met and conferred with Malcolm Leach.

18

On or about December 1, 1941, from Washington, District of Columbia, the defendant Donald Wakefield Smith conferred by telephone with Donald MacGregor in Chicago, Illinois.

19

On or about December 5, 1941, the defendants James G. Fuller and Donald Wakefield Smith traveled from Washington, District of Columbia, to Chicago, Illinois.

20

On or about December 6, 1941, at Chicago, Illinois, the defendants James G. Fuller and Donald Wakefield Smith

met and conferred with Don Forse, John Hamilton, Donald MacGregor and other persons.

21

On or about December 15, 1941, the defendants James G. Fuller, James M. Curley and Marshall J. Fitzgerald held a Board of Directors meeting of Engineers' Group, Inc. and elected the defendant Donald Wakefield Smith, Vice-President and Treasurer of Engineers' Group, Inc.

22

On or about December 15, 1941, the defendant Donald Wakefield Smith accepted the office of and assumed to act as the Vice-President and Treasurer of Engineers' Group, Inc.

23

On or about December 19, 1941, at Washington, District of Columbia, the defendants James G. Fuller and Donald Wakefield Smith met and conferred with Don Forse and John Hamilton.

24

On or about January 5, 1942, at Washington, District of Columbia, the defendants James G. Fuller, Donald Wakefield Smith, James Barton Underwood and Marshall J. Fitzgerald attended a Board of Directors meeting of Engineers' Group, Inc., at which meeting the affairs of Engineers' Group, Inc. were discussed, and the defendant James Barton Underwood elected President of Engineers' Group, Inc.

25

On or about January 5, 1942, at Washington, District of Columbia, the defendant James Barton Underwood accepted the office of and assumed to act as the President of Engineers' Group, Inc.

26

On or about January 11, 1942, at Chicago, Illinois, the defendants James G. Fuller, Bert Hall, James Barton Un-

derwood and Donald Wakefield Smith met and conferred with A. E. Schumacher.

27

On or about January 12, 1942, at Anderson, Indiana, the defendants James G. Fuller, Bert Hall and James Barton Underwood met and conferred with Don Forse and John Hamilton.

28

On or about January 14, 1942, the defendant Bert Hall received the sum of $750.00 from Engineers' Group, Inc.

29

On or about January 15, 1942, the defendant James Barton Underwood received the sum of $400.00 from Engineers' Group, Inc.

30

On or about January 20, 1942, at Erie, Pennsylvania, the defendants James G. Fuller, Donald Wakefield Smith, Bert Hall and James Barton Underwood met and conferred with William H. Forster, Jr., C. H. Hoffstetter, and other persons.

31

On or about January 20, 1942, the defendant Bert Hall received an automobile paid for from the funds of Engineers' Group, Inc.

32

On or about January 21, 1942, the defendants James G. Fuller, Donald Wakefield Smith, James Barton Underwood and Bert Hall met and conferred in Pittsburgh, Pennsylvania.

33

On or about January 27, 1942, at Chicago, Illinois, the defendant Bert Hall visited the plant of the Advertising Metal Display Company.

34

On or about February 2, 1942, the defendant Donald Wakefield Smith accepted the office of and assumed to act as the Assistant Secretary of Engineers' Group, Inc.

against the peace and dignity of the United States and contrary to the form of the statute of the United States in such cases made and provided (18 U. S. C. 88).

EDWARD M. CURRAN,
*United States Attorney;*
TOM C. CLARK,
*Assistant Attorney General;*
ROY C. FRANK,
*Special Assistant to the Attorney General;*
ROBERT W. STRANGE,
*Special Assistant to the Attorney General;*
WILLIAM A. PAISLEY,
*Special Assistant to the Attorney General.*

A true bill.
HAROLD M. COLLSON,
*Foreman of the Grand Jury.*

[Stamp:] United States Court of Appeals for the District of Columbia. Filed Jan. 13, 1947. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 9208

JAMES M. CURLEY, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

No. 9209

DONALD WAKEFIELD SMITH, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

No. 9215

JAMES G. FULLER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Appeals from the District Court of the United States for the District of Columbia

Argued June 6, 1946. Decided January 13, 1947

*Mr. William E. Leahy,* with whom *Mr. Nicholas J. Chase* was on the brief, for appellant in No. 9208.

*Mr. William A. Gallagher* for appellant in No. 9209.

*Mr. T. Emmett McKenzie* for appellant in No. 9215.

*Mr. William A. Paisley,* Special Assistant to the Attorney General, with whom *Mr. Edward M. Curran,* United States Attorney at the time the brief was filed, was on the brief,

for appellee. *Mr. Sidney S. Sachs,* Assistant United States Attorney, also entered an appearance for appellee.

Before EDGERTON, WILBUR K. MILLER and PRETTYMAN, JJ.

PRETTYMAN, J.:

Appellants were indicted for violation of the mail fraud statute [1] and for conspiracy to violate that statute.[2] Trial was had before a jury. At the conclusion of the case for the prosecution, the defendants moved for directed verdicts of acquittal. The court denied the motions. Defendants Curley and Fuller stood on the motions and offered no evidence. Defendant Smith presented, eight character witnesses and proffered certain documentary evidence. These three defendants were convicted on the conspiracy count. They were acquitted on some of the substantive counts and convicted on others. The appeals were consolidated for argument.

The evidence can be skeletonized for present purposes. There was an organized group, called Engineers' Group, later incorporated. The membership in the Group was identified, consisting, so far as here material, of its officers. Certain activities were carried on in the name of the group and the mails were used in furtherance thereof. Those activities included the negotiation and execution of contracts with manufacturing and construction concerns and the receipt of money from those concerns. The contracts related to the procurement of government war work and housing construction, and the furnishing of engineering and similar service in connection with that work. In the negotiation of the contracts, representations were made in the name of the Group as to business controlled by it, its staff, its assets, and the existing status of various government projects. The money was received by the Group under agreements that it be held as deposits and returned if contemplated business projects did not materialize.

---

[1] 18 U. S. C. A. § 338.

[2] 18 U. S. C. A. § 88.

The representations were false, and the agreements were not kept, except that three refunds were made from funds paid in by other people. The Group was represented as having within its control the designation of contractors on certain government housing projects and war work. It had none. Its staff was represented as large and experienced. It was not. It was represented as having large amounts of cash in bank and extensive security holdings. It had no such amounts or holdings. Certain housing projects were represented as having been approved by the Federal Housing Administration. They had not been. Commitments on financing were represented as having been made by financial institutions on certain projects. No such commitments had been made. These various representations were inducements for the contracts made by the Group with its customers or clients. They were made verbally, in letters, in contract agreements, and in a brochure widely distributed. The money received as deposits was not held but was spent as received.

The representations above described, or some of them, were made to every concern with which the Group concluded a contract, and to others with whom no contracts were concluded. The money received as deposits was the only money the Group ever received. No money was paid in to it as capital, although the corporation's financial statements indicated outstanding stock in the amount of $20,000; and none was loaned it by its owners or otherwise.

Engineers' Group began activities in June or July, 1941, and was incorporated in October of that year. The venture disintegrated in February, 1942, with overdrafts at the bank, unpaid wages to employees, and other unpaid bills. About $67,000 [3] had been received from customers and about $9,600 refunded to them.

---

[3] The account book (Ex. 108) shows $5,000 received November 6 and 7, 1941, from Fells Plumbing and Heating Company, and $2,500 "check returned" to that Company November 19th. No explanation of the items appears elsewhere. We include $2,500, the indicated net receipt, as received from this Company.

The representations made in the name of the Group were usually made by appellant Fuller, its vice president. The contracts were in large part negotiated by Fuller, and all were executed by him. The office was managed by him, and he controlled the disposition of the funds on hand. He withdrew about $18,000 "in checks to himself or otherwise."

Appellant Curley was president of the Group from June 26, 1941, and of the corporation from its incorporation until his resignation about the middle of December, 1941. He introduced several customers, or clients, to Fuller, with statements such as that Fuller, "our man in Washington," had a project that was all ready to materialize, all ready to go; and "Mr. Fuller is our man who handles the details of these matters"; and "this group had several jobs and several contracts and they needed contracts to do them." Curley at one time sought to secure a "loan" from a bank to the Group, upon an understanding that the amount would remain in the bank as an account in the name of the Group, not subject to withdrawal; and that the bank would advise any inquirer that the Group had that amount on deposit at the bank. Curley knew money was being received by the Group upon condition that it be returned, as at least one depositor invoked his aid in securing a return of his deposit. Curley was frequently at the office of the Group in Washington and upon occasion was in the room while Fuller was discussing possible contracts with customers.

Curley did not execute any contracts. He did not, so far as the record shows, know of the brochure. He signed no letters. Except for the introduction of clients to Fuller and statements of the nature of those which we have quoted, he did not participate in the negotiation of contracts with customers. There is a dispute as to the source of a payment to him of $3,500 in currency, which he used on August 8th to take up the second of two checks signed by one Newcomb, payable to and endorsed by Fuller, which had not cleared. The first money shown by the record to have been received by the Group was not received until August 12th. Curley testified in the Municipal Court of the City of Boston that he had received that amount "from one of the officials of the Engineers' Group," shown to have been Fuller, and

that he "worked with them in the development of business." He said that in the transaction he had acted "as a messenger or agent." There is no evidence purporting to show that Curley received any other money from the Group.

The principal point made by appellant Curley is that the trial court erred in refusing to direct a verdict of acquittal as to him. It is not disputed that upon a motion for a directed verdict, the judge must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom. Appellant relies upon statements of this and other courts concerning the tests by which a trial judge must determine the proper action upon the motion. For example, in *Hammond* v. *United States*, 75 U. S. App. D. C. 397, 127 F. 2d 752 (1942), this court quoted from *Isbell* v. *United States*[4] as follows:

> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him."

It is true that the quoted statement seems to say that unless the evidence excludes the hypothesis of innocence, the judge must direct a verdict. And it also seems to say that if the evidence is such that a reasonable mind might fairly conclude either innocence or guilt, a verdict of guilt must be reversed on appeal. But obviously neither of those translations is the law. Logically, the ultimate premise of that thesis is that if a reasonable mind might have a reasonable doubt, there is, therefore, a reasonable doubt. That is not true. Like many another rule become trite by repetition, the quoted statement is misleading and has become confused in application.

The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven

---

[4] 227 Fed. 788, 792 (C. C. A. 8th, 1915).

facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or nonexistence of a reasonable doubt as to guilt.[5] If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. The law recognizes that the scope of a reasonable mind is broad. Its conclusion is not always a point certain, but, upon given evidence, may be one of a number of conclusions. Both innocence and guilt beyond reasonable doubt may lie fairly within the limits of reasonable conclusion from given facts. The judge's function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind.

The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal,[6] must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. In a given case, particularly one of cir-

---

[5] See discussion in *United States* v. *United States Gypsum Co.*, 51 F. Supp. 613, 628-633 (D. C. D. C. 1943).

[6] Motion for judgment of acquittal under Rule 29(a) of the new Federal Rules of Criminal Procedure.

cumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know of no way to avoid that difficulty.

To be valid, the first part of the above-quoted statement from the *Hammond* case, *supra*, must be understood to mean that the judge cannot let a case go to the jury unless there is evidence of some fact which to a reasonable mind fairly excludes the hypothesis of innocence. The statement refers to the requisite presence of evidence, and not to the absence or effect of other evidence. The second part of the quoted statement means that if, upon the whole of the evidence, a reasonable mind must be in balance as between guilt and innocence, a verdict of guilt cannot be sustained.

Although this court has made the statement we have quoted, the rule actually applied has been as we now state it. Thus, in the opinion in the *Hammond* case, *supra*, after the quoted sentence, the court went on to say, "In the light of the circumstances we have related, we think it impossible that a jury of reasonable men could have fairly reached the conclusion that appellant, in what he did, necessarily intended to commit rape." And in the *Cady* case,[7] the court said that the quoted rule "is not applicable here, because the facts established are such that the jury was fully warranted in deducing from them inferences which excluded every other hypothesis but that of guilt."

If the judge were to direct acquittal whenever in his opinion the evidence failed to exclude every hypothesis but that of guilt, he would preempt the functions of the jury. Under such rule, the judge would have to be convinced of guilt beyond peradventure of doubt before the jury would be permitted to consider the case. That is not the place of the jury in criminal procedure. They are the judges of the facts and of guilt or innocence, not merely a device for checking upon the conclusions of the judge.

It is said that the accused is presumed to be innocent. That statement is absolutely true, and it is also true that the pre-

[7] Cady v. United States, 54 App. D. C. 10, 293 Fed. 829 (1923).

sumption follows the accused until a verdict has been reached. But persuasion of guilt beyond a reasonable doubt overcomes the presumption. Our whole discussion centers about the function of determining reasonable doubt *vel non*. We hold that it is the jury's function, provided the evidence is such as to permit a reasonable mind fairly to reach either of the two conclusions. We do not in any way impinge upon the presumption of innocence. We find the rule of procedure by which that presumption is overcome.

The rule as we state it is supported not only by the reasoning we have indicated, but by ample authority.[8]

The confusion which seems to have arisen upon the subject is traceable, we think, to a failure to observe in some cases the clear difference between the tests applicable to a motion for a directed verdict and the tests by which a jury must determine its verdict. The trial judge must act upon the motion, and he must also instruct the jury. The difference between his functions and the functions of the jury makes a difference between the tests which must guide him in acting upon the motion and the tests as to which he must instruct the jury.

The matter has an interesting historical background. Of course the roots lie in the long controversy over the respective functions of judges and juries in criminal cases. We need not recite that history here.[9] But a more specific

---

[8] Pierce v. United States, 252 U. S. 239, 64 L. Ed. 542, 40 S. Ct. 205 (1920); Stilson v. United States, 250 U. S. 583, 63 L. Ed. 1154, 40 S. Ct. 28 (1919); Glasser v. United States, 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457 (1942); Gorin v. United States, 312 U. S. 19, 85 L. Ed. 488, 61 S. Ct. 429 (1941); United States v. Manton, 107 F. 2d 834 (C. C. A. 2d, 1938); United States v. Morley, 99 F. 2d 683 (C. C. A. 7th, 1938); Smith v. United States, 61 App. D. C. 344, 62 F. 2d 1061 (1932). *See* the discussion in United States v. United States Gypsum Co., 51 F. Supp. 613, 628-633 (D. C. D. C. 1943).

[9] *See* Bushell's Case, Vaughan 135, 6 How. St. Tr. 999 (1670); United States v. Battiste, 24 Fed. Cas. 1042, No. 14,545 (C. C. D. Mass. 1835); State v. Fetterer, 65 Conn.

historical chain of events appears in the reports. Originally the language quoted by this court in the *Hammond* case, *supra*, and above-quoted, was used in charges to the jury. The several reports of *United States* v. *Babcock* [10] seem to have been the source of some of the later confusion. In one report [11] is the court's consideration of a motion to direct a verdict. After discussing the relative functions of judge and jury, and relying upon *Hickman* v. *Jones* [12] and *Sioux City & Pacific R. R.* v. *Stout*,[13] the court held that upon the motion, not only all facts in evidence must be considered as admitted, "but also every conclusion which a jury might fairly or reasonably infer therefrom"; and that where different men equally sensible and equally impartial would make different inferences, the case is for the jury. Another report in the same case [14] contains the court's charge to the jury. Here the court used as a correct exposition of the law applicable to the jury, a portion of the opinion in *People* v. *Bennett* [15] as follows:

> "The evidence must be such as to exclude every (reasonable) hypothesis but that of his guilt of the offense imputed to him; or, in other words, the facts proved must all be consistent with and point to his guilt not only, but they must be inconsistent with his innocence."

---

287, 32 Atl. 394 (1894); 9 Wigmore, Evidence (3d ed. 1940) § 2495 (e); Warvelle, The Jurors and the Judge (1909) 23 Harv. L. Rev. 123, 128, 130, 131; Howe, Juries as Judges of Criminal Law (1939) 52 Harv. L. Rev. 582, 586, 603.

---

[10] 24 Fed. Cas. 909, 912, 913 (C. C. E. D. Mo. 1876).

[11] No. 14,486, *id.* at 912.

[12] 9 Wall. 197, 19 L. Ed. 551 (1870).

[13] 17 Wall. 657, 21 L. Ed. 745 (1874).

[14] The charge to the jury is reported as Case No. 14,487, 24 Fed. Cas. 913.

[15] 49 N. Y. 135 (1872).

Years later, in *Hart* v. *United States*,[16] an appellate court considered whether the trial court erred in letting the case go to the jury, and, in affirming, said in part:

> "But, as we have said, the truth or falsity of the charge of unlawful combination, and of defendant's inculpating knowledge, could be determined only by inference from the facts shown; and the inference which the plaintiff in error insists should have been arbitrarily assumed was surely not a necessary one, and the jury has found it to be not even a reasonable one. We are clearly of opinion that it was not error to allow them to decide whether it was or not. The rule that, to justify conviction of crime, the evidence must be such as to exclude every reasonable hypothesis but that of guilt, has not, it will be observed, been overlooked. But by whom is this rule to be applied? In some cases, no doubt, by the court; but certainly not in such a one as this, where the reasonableness of the only hypothesis of innocence propounded presents at least a question upon which men of ordinary intelligence might honestly differ."

Then, still later, the Circuit Court of Appeals for the Eighth Circuit,[17] relying for authority upon *People* v. *Bennett* [18], *United States* v. *Babcock*, No. 14,487,[19] *United States* v. *Hart*,[20] and *United States* v. *McKenzie*,[21] reversed a judgment for failure of the trial court to direct a verdict and recited the following as controlling upon the court in acting upon the motion:

> "Circumstantial evidence warrants a conviction in a criminal case, provided it is such as to exclude every

---

[16] 84 Fed. 799 (C. C. A. 3d, 1898).

[17] Vernon v. United States, 146 Fed. 121 (C. C. A. 8th, 1906).

[18] *Supra* n. 15.

[19] *Supra* n. 14.

[20] *Supra* n. 16.

[21] 35 Fed. 826 (D. C. S. D. Cal. 1887).

> reasonable hypothesis but that of guilt of the offense imputed to the defendant; or, in other words, the facts proved must all be consistent with and point to his guilt only and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proved and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or of guilt the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted."

In all of the cases which that court cited, the stated rule had been used as an instruction to the jury and was approved as such.

In *Union Pacific Coal Co.* v. *United States*,[22] the same court again recited the rule as applying to a motion for a directed verdict, this time Judge Sanborn speaking in the language which has been so frequently quoted and relying upon *Vernon* v. *United States*[23] and the cases therein cited. Thereafter the same court, in *Isbell* v. *United States*,[24] upon the same authorities, quoted the same rule, but this time the statement was under attack and the court explained its meaning at length. Judge Sanborn said:

> "The rule is that where *all*[25] the substantial evidence was as consistent with innocence as with guilt it is the duty of the appellate court to reverse the judgment against a defendant, not where there was a preponderance of the substantial evidence, or witnesses of the greater credibility in favor of his innocence, but where there was no substantial evidence, no substantial testimony nor credible witness whatever, of any facts inconsistent with the innocence of the accused. This is the only question the court is required or permitted to determine under this rule, and where there was any substantial evidence inconsistent with the innocence

---

[22] 173 Fed. 737 (C. C. A. 8th, 1909).

[23] *Supra* n. 17.

[24] *Supra* n. 4.

[25] The emphasis was indicated in the opinion.

> of the accused, although it may have been contradicted and overwhelmed by the testimony to the contrary, the weight of the evidence, the credibility of the witnesses and the guilt or innocence of the defendant are left to the determination of the jury."

Judge Carland dissented in that case, because he said that the unexplained statement of the rule is not the law, and concluded, "The explanation of what the language which I object to means as set forth in the majority opinion demonstrates, in my opinion, that it would be well to omit the language objected to."

In *Nosowitz* v. *United States*,[26] the Second Circuit used as the rule applicable to motions for directed verdict, without further explanation, the language which this court quoted in the *Hammond* case, *supra*, and cited *Union Pacific Coal Co.* v. *United States*[27] and *Isbell* v. *United States*,[28] as authority. The same court did the same thing in *Romano* v. *United States*,[29] citing *Nosowitz* v. *United States*[30] as authority. From that time on, that language has been repeatedly recited by various courts as the rule which must govern a trial judge in passing upon a motion for a directed verdict. As we have indicated, we are of opinion that the statement is erroneous for that purpose, or at the least, misleading. It is correct as a guide for a jury in reaching a verdict. The minds in which a reasonable doubt, or its absence, must be established, are the minds of the jury.

It is only fair to say that the view which we take is perhaps at variance with the views which have been taken by some of the Circuit Courts of Appeal.[31]

---

[26] 282 Fed. 575 (C. C. A. 2d, 1922).

[27] *Supra* n. 22.

[28] *Supra* n. 4.

[29] 9 F. 2d 522 (C. C. A. 2d, 1925).

[30] *Supra* n. 26.

[31] The Eighth Circuit, in *Gargotta* v. *United States*, 77 F.2d 977 (1935), the Third Circuit, in *Nicola* v. *United States*, 72 F.2d 780 (1934), *Grant* v. *United States*, 49 F.2d 118 (1931), and *Graceffo* v. *United States*, 46 F.2d 852

Mindful of the rule of law as we have stated it, our first inquiry upon the facts in the case at bar is directed to the proof of a conspiracy to defraud. As we have pointed out, there was an organized Group and it had group activities. At the least, it rented offices, hired employees, paid telephone bills, made contracts, and did business. Appellants say that all the proven facts are consistent with the theory that the Group really expected that it would secure government contracts for its customers, to the profit of all concerned, but that its plans went awry; thus, that the plan was bona fide and merely failed of accomplishment. The contention ignores the misrepresentations, made from the very beginning, that the Group controlled the designation of contractors, that it actually had contracts to allocate, that its staff was large and experienced and its assets substantial. Those false representations as to existing facts may fairly be thought to disprove the claim of good faith in the plain. Moreover, the contention suffers from the failure of the Group to provide funds with which to carry on until its expected business should materialize. If the original plan had been bona fide, it is hard to see why appellants did not supply or secure funds with which to meet obviously necessary operating expenses and thus to protect the deposits they intended to hold for return. Certainly the members of the Group who were conscious of what was being done in their names were, at the least, indifferent to the eventual result to the customers. The most charitable view which is possible is that customers were induced by false statements to supply the funds with which the Group gambled on success in its genuine hopes. Even that would be obtaining money by false representations. The jury was entitled to put a less favorable construction upon the circumstances.

---

(1931), the Tenth Circuit, in *Parnell* v. *United States,* 64 F.2d 324, 329 (*on rehearing,* 1933), and *Leslie* v. *United States,* 43 F. 2d 288 (1930) (*see* concurring opinion), and the Second Circuit, in *Nosowitz* v. *United States,* 282 Fed. 575 (1922), and *Romano* v. *United States,* 9 F. 2d 522 (1925), seem to have taken a view different from ours.

Furthermore, even if the main plan were legitimate, plans and agreements which were secondary to the main plan might be fraudulent. Suppose a group intended to enter the grocery business and to make huge profits; nevertheless, if stock in the enterprise were sold by false representations of fact and the receipts from such sales were wilfully squandered in promotion and operating expenses instead of being applied to the declared uses, the scheme would be fraudulent. That the scheme was secondary to a legitimate actual and declared objective would be immaterial. So here, even if the prime purpose were ultimate profit to everybody, an agreement to defraud in the preparatory steps of the project would be sufficient to violate the statute.

The Supreme Court has said:[32]

> "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.' [Citing *United States* v. *Manton*, 107 F. 2d 834.]"

It seems to us that in the case at bar the jury might reasonably conclude that, beyond a reasonable doubt, the members of this organized Group consciously planned to secure funds from outside parties by gross misrepresentations, and to spend that money, anticipating that if the main venture were successful abundant profits to all would result, but that if it failed the loss would be upon the customers and not upon the Group. If the Group knew that the venture was wholly a speculative risk, but persuaded the customers by false statements that reasonable certainty of success and full certainty of no loss were insured, the scheme was a scheme to obtain money by means of false representations and promises.

The next inquiry upon the facts in the case at bar concerns the participation of Curley. The crucial question at this point seems to us to be whether he knew of the wrongful acts being committed in the name of the Group. Be-

---

[32] Glasser v. United States, 315 U. S. 60, 80, 86 L. Ed. 680, 62 S. Ct. 457 (1942).

cause, if he knew, reasonable minds might fairly conclude that he must necessarily have been a participant in the scheme, *i.e.*, a conspirator; that no other hypothesis is consistent with that knowledge and his acts. Was such knowledge on his part a legitimate inference from the proven facts? It seems to us that it was. He was president of the corporation. He was frequently in its offices. He introduced customers. He personally attempted to arrange with a bank for a "loan" which was to be left on deposit, a sham depiction of financial substance. The misrepresentations made by the Group were total, not incidental or occasional. They were made not to occasional customers or clients but to all of them. The misrepresentations were not as to whether a group, in control of certain contracts, was also in control of others; this Group had control of no contracts whatever. The misrepresentations were not as to incidents of the staff and organization of the Group; it had no staff worthy of the name. The Group did not have funds which it might legitimately use for operating expenses and, by inadvertence or misconduct of an individual, dip into other funds which it was obligated to hold on deposit; it had no funds whatever, other than the deposits. Occasional, incidental or partial misrepresentation or misappropriation by one officer of a corporation may be unimpressive as a basis for imputing knowledge to another officer; but total misrepresentation of the corporate affairs and total diversion of funds is substantial ground for an inference of knowledge on the part of an active and experienced president. The jury might fairly and legitimately infer as a fact from the proven facts that Curley knew of the wrongs being committed. As we have said, if he knew, his proven activities with and on behalf of the Group might fairly lead, if not compel, reasonable men to conclude that he must necessarily have been a participant in the plans of the Group. It cannot be said that upon all this evidence reasonable minds must necessarily doubt that Curley was a participant in the activities of the Group.

All of the evidence to which we have referred was *aliunde* the declarations of alleged co-conspirators, and thus the preceding discussion is clear of any dispute as to the admissibility of such declarations. If our conclusions on

the foregoing matter are correct, those declarations were admissible, and they tend to strengthen the contentions of the Government.

The decision in the case rests squarely upon the rule of law governing the action of the trial judge upon the motion for directed verdict of acquittal and the action of an appellate court upon a verdict of conviction. We agree, as Curley contends, that upon the evidence reasonable minds might have had a reasonable doubt. As much might be said in many, if not in most, criminal cases. The jury, within the realm of reason, might have concluded that it was possible that Curley was merely a figurehead, that he had complete faith in Fuller, that he never asked any questions, that he was never informed as to the contents of the contracts with customers or the financial statements or the use of the money; in short, that it was possible that he was as much put upon as were the customers. If the jury had concluded that such was a reasonable possibility, it might have had a reasonable doubt as to guilt. But, as we have stated, that possibility is not the criterion which determines the action of the trial judge upon the motion for directed verdict and is not the basis upon which this court must test the validity of the verdict and the judgment. If the evidence reasonably permits a verdict of acquittal or a verdict of guilt, the decision is for the jury to make. In such case, an appellate court cannot disturb the judgment of the jury. If we ourselves doubted Curley's guilt, that doubt would be legally immaterial, in view of the evidence and the rule of law applicable. However, we think it proper to add, under the circumstances of the case, that to us, as to the jury, there is no doubt.

We find no substantial error in the other respects in which the appellant Curley asserts that the trial court erred. That the substantive counts may relate to the overt acts charged in the conspiracy count, and that each participant in a conspiracy is liable upon substantive counts for all acts committed by another conspirator pursuant to the conspiracy, are settled by *Pinkerton* v. *United States*, U. S. Sup. Ct. June 10, 1946, 14 U. S. L. Week 4456. That Curley's testimony taken in the Municipal Court of the City of Bos-

ton, on behalf of a judgment creditor, was admissible in the present case, was settled by *Feldman* v. *United States*, 322 U. S. 487, 88 L. Ed. 1408, 64 S. Ct. 1082 (1944).

Appellant Fuller makes the same contention as does Curley in respect to the motion for a directed verdict, but his contention has not the same foundation in the facts. Fuller was the active agent throughout. It is plain that the trial judge correctly denied Fuller's motion. We find no other error of substance in respect to this appellant.

Appellant Smith shows that he came into the organization late and left soon thereafter, being treasurer of it for only two months. He shows that he had difficulty in getting possession of the books and did not actually get them for a month. But the record indicates his activity in connection with the organization before he was treasurer, and he was an actual participant in the negotiation of several of the contracts with customers. He was shown to have knowledge of the state of the finances. We think the evidence sufficient to send the case to the jury and to sustain the verdict.

Appellant Smith urges as error the refusal of the court to admit in evidence 20 exhibits offered by him. His counsel refers to 14 of these as showing his good faith and the absence of any knowledge on his part of any fraud or misrepresentation.[33] From time to time during the presentation of the Government's evidence, counsel for Smith, in cross examination, presented the witnesses with documents which they identified. At one point Government counsel objected to this procedure on the ground that Smith was thereby making the witness his own witness, and that he could not introduce his own evidence in the course of cross examination. The court said, however, that in the interest

[33] Our discussion does not relate to 4 of the 14. Smith Exhibit No. 2 became Government 163 and was admitted. Smith No. 7 became Government 98 and was admitted. Smith No. 9, although marked for identification, was not actually identified. Smith No. 20 was an affidavit of Smith himself and was clearly inadmissible as a self-serving declaration.

of expedition he would permit a witness to identify a document while he was on the witness stand, although he would not let counsel for Smith pursue the matter beyond that point during the course of cross examination. In this manner the 20 exhibits were identified. When the evidence was apparently all in, both sides announced that they rested. This happened to be on a Friday, and the court thereupon excused the jury until Tuesday. Monday was devoted to a discussion of requests for instructions, and at the conclusion of that discussion, counsel for Smith said that he believed he had forgotten to offer formally in evidence the documents which had been identified. Government counsel protested on the ground that to admit the documents would be to reopen the case, requiring cross examination, rebuttal, etc. Counsel for Smith points out that the Government had had the documents for some two years, that they had been identified by Government witnesses, and that his failure to move their admission was an inadvertence purely technical in nature. The court ruled that it would not permit the reopening of the case at that stage.

In view of all the circumstances, including the nature of the exhibits, the absence of surprise to Government counsel, the manner of their identification, and the fact that the case had not been argued to the jury, we think that if the exclusion of these exhibits had affected the substantial rights of Smith, the action of the court might have constituted reversible error. Whether his substantial rights were affected depends upon the nature of the documents.

We have carefully examined all of these exhibits. Some of them consist of correspondence between customers and Fuller, relating to the business of the corporation, and do not refer to Smith in any way; one is merely an inquiry from one company to another concerning Smith and Engineers' Group; two concern Smith's business activities after he left Engineers' Group, running from April, 1942, to August, 1943; one is a statement of the deposits made and checks issued by Smith while he was treasurer; and the last is a statement by Fuller showing that he authorized Smith to issue the checks which were issued. We do not see how these exhibits relate to Smith's good faith; they throw no

light on it one way or the other. The nearest approach to the subject is one statement in a letter from a customer to Smith, in which the customer indicated that he then thought that Fuller was a rascal but that Smith did not deserve to be involved; but the author of that letter was on the witness stand during the trial and counsel had full opportunity to draw from him the full measure of his exoneration of Smith. It does not seem to us that the exclusion of this evidence, therefore, affected the substantial rights of Smith.[34]

*Affirmed.*

WILBUR K. MILLER, *J.*, dissenting in No. 9208:

It is my view that the jury should have been instructed to find the appellant, James M. Curley, not guilty. The wrongs were done by Fuller. Curley made no representations to anybody. He did not participate in negotiations with customers. He signed no letters, executed no contracts. He did not know of the brochure or the financial statement. He received no money or other thing of value. All this is admitted, even recited, in the court's opinion.

Whether Curley was guilty depended, therefore, on whether he knew of the wrongful acts being committed in the name of the Group. That, the court correctly says, is the crucial question with respect to him. There was no criminal intent if he did not know. If he knew, then it would follow that he had become a conspirator with Fuller. But the evidence of knowledge must be clear, not equivocal.[35]

---

[34] Judicial Code § 269 as amended, 28 U. S. C. A. § 391.

[35] Chief Justice Stone said in *U. S.* v. *Falcone*, 311 U. S. 205, 210:

> "The gist of the offense of conspiracy as defined by §37 of the Criminal Code, 18 U. S. C. § 88, is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. (Cases cited.) Those having no knowledge of the conspiracy are not conspirators; and one who without more furnishes supplies to an illicit distiler is not guilty of conspiracy even though his sale may have furthered the object of

It is true, of course, that whether Curley had knowledge of Fuller's wrongdoing could not be proved directly, but could only be inferred from what Curley did. Nevertheless, the presumption of innocence insists that there be no equivocation in that proof. As always, it must convince beyond a reasonable doubt. If it be not of that quality, if it be not clear but equivocal, then the jury must not be permitted to speculate that the defendant is guilty.

Let us see then what Curley did. We need go no further than the court's opinion, where the proof of his acts is thus summarized:

> "He was president of the Group. He was frequently in its offices. He introduced customers. He personally attempted to arrange with a bank for a loan which was to be left on deposit. . . ."

---

> a conspiracy to which the distiller was a party but of which the supplier had no knowledge."

Mr. Justice Rutledge, writing in *Direct Sales Co.* v. *U. S.*, 319 U. S. 703, said that the Falcone decision "comes down merely to this, that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; . . ." He then adds, "Without the knowledge, the intent cannot exist. *United States* v. *Falcone, supra.** Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal."

* At this point, Mr. Justice Rutledge appended the following foot-note, which seems to me to be of particular sigficance in the present case:

> "Although this principle was there applied to aiding and abetting a conspiracy among others, it has at least equal force in a situation where the charge is conspiring with another to further his unlawful conduct, without reference to any conspiracy between him and third persons."

That is all the record shows against Curley, except that he once attempted, at the request of a customer of the Group, to get Fuller to return that customer's deposit.

What of the quality of such proof? Is it unequivocal so as to fairly permit a jury to infer, beyond a reasonable doubt, that Curley knew of Fuller's wrongful acts? In that respect, again we need go no further than the court's opinion, where we read, "The jury, within the realm of reason, might have concluded that it was possible . . . that he was as much put upon as were the customers."

That statement, with which I quite agree, means that Curley's conduct was reasonably consistent with his innocence. So, at the conclusion of the government's evidence, when the case was submitted to the jury, that body could believe every word said against Curley and still it must choose between inferring guilt or innocence, when the evidence afforded no reason for choosing the former instead of the latter. In such circumstances, it is impossible for the jury to infer guilt; it can only surmise it. Webster says that the word "infer" frequently implies little more than "surmise," but I have never supposed that such a connotation is proper concerning the action of a jury in a criminal case.

It should be remembered that in this case there was no room for weighing evidence, determining the credibility of witnesses, or drawing *justifiable* inferences from proved facts—all traditional functions of the jury. For, on the motion for a directed verdict, the government's evidence could be given the fullest weight, its witnesses could be regarded as credible, and yet the inference of guilt was not justifiable and the jury should not have been permitted to draw it. The reason is that the inference of guilt from circumstantial evidence is never justifiable when the proved facts at least equally well permit innocence to be inferred. Guilt can be inferred from such evidence only when it is so strongly compelled that the inference of innocence is excluded.

With the meagre evidence against Curley quite consistent with his innocence, as the court says, it seems to me that the

case falls squarely within the rule announced by this court in *Hammond* v. *United States*:[36]

> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him."

This is not a new rule in this jurisdiction, for as far back as 1923, in *Cady* v. *United States*,[37] this court spoke approvingly of it as a "well-established and oft-repeated principle." I think it is a sound rule, because it is based upon the presumption of innocence. But the court's opinion in this case definitely overturns it and, in effect, announces that it is no longer necessary for the government's proof to foreclose the hypothesis of innocence.

To prove guilt beyond a reasonable doubt does not mean merely to prove certain facts which are as consistent with innocence as guilt. To me the expression means to submit evidence which produces in the minds of the jurors an abiding and conscientious conviction, to a moral certainty, that the accused is guilty. I am aware of the fact that his classic paraphrase of proof beyond a reasonable doubt by Chief Justice Shaw of Massachusetts [38] has been criticized of late, but I do not agree with the critics. Reasonable doubt is not eliminated by evidence from which the jury may draw either of two irreconcilable inferences.

There is in civil cases a rule which is apropos here, for if it be the rule in civil cases it is much more necessary that it be the rule also in similar situations in criminal cases. In *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333, 339, the Supreme Court said:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each

---

[36] 75 U. S. App. D. C. 397, 127 F. (2d) 752.

[37] 54 App. D. C. 10, 11, 293 Fed. 829, 830.

[38] *Commonwealth* v. *Webster*, 5 Cush. 295, 320.

> of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover."

Again, at page 340, the Supreme Court quoted the following sentence with approval:

> "There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover."

The jury inferred guilt, when the court said it "might have concluded that it was possible" that Curley was innocent. We, therefore, have a case where proved facts give equal support to each of two inconsistent inferences. Judgment, *as a matter of law,* must go against the government which had thrown upon it by the presumption of innocence the necessity of justifying the inference of guilt.

Under the view of the evidence which the court has taken and in which in the main I concur, the *Hammond* case unquestionably required a reversal as to Curley. So my brothers of the majority say that the rule stated in the *Hammond* case is misleading and has become confused in application.

The confusion which they discern they attribute "to a failure to observe in some cases the clear difference between the tests applicable to a motion for a directed verdict and the tests by which a jury must determine its verdict." Originally, they say, the language quoted in the *Hammond* case was used in charges to the jury, and only later came in vogue as a guide for the court in considering a motion for a directed verdict. The opinion then adds that "the statement is erroneous for that purpose, or, at the least, misleading. It is correct as a guide for the jury in reaching a verdict."

The implication is, I suppose, that gradually and through a sort of evolution, as it were, and perhaps inadvertently, numerous courts, including this one in the *Hammond* case,

have fallen into error. It will be observed, however, that the *Hammond* opinion quotes its rule from *Isbell* v. *United States,* 227 Fed. 788, decided by the Eighth Circuit in 1915. Because of the learning, ability and industry of the members of this court who decided the *Hammond* case (Chief Justice Groner and Justices Edgerton and Rutledge, the latter now an associate justice of the Supreme Court of the United States) it may properly be inferred, or surmised, that the *Isbell* case was examined and considered carefully before its statement of the rule was adopted. We may safely assume also that the court exhausted the authorities on the subject, and certainly it read and considered the dissenting opinion in the *Isbell* case. That dissent had the same quarrel with the statement quoted by us in the *Hammond* case which the majority raise in deciding this case. The basis of the dissent is identical with the basis of the court's opinion here.

It follows, therefore, that there was nothing inadvertent about the adoption of the *Hammond* rule. It was deliberately done by an able and unanimous court, after having attention sharply called to the theory which the opinion in this case says is the "true rule."

The case of *Estep* v. *United States,*[39] decided in 1943 by the Court of Appeals for the Tenth Circuit, is instructive in connection with the consideration of the present case.

Estep, Deluke and Henry were convicted of having devised a fraudulent scheme for the sale of mining stock and of having used the mail in connection with the sale of the stock in violation of the mail fraud statute, and of a conspiracy to devise the fraudulent scheme. It was amply proved that Henry and Deluke were guilty, although they maintained that they had an honest belief in the representations and promises which they had made. Upon the trial they reasserted their faith in the potentialities of the mining property. It was undisputed that the money obtained by the sale of the stock, with the exception of certain commissions, was used in the development and operation of the mines.

Estep contended that if there was a fraudulent scheme or conspiracy, he was never a party to it and never a conscious

---

[39] 140 F. (2d) 40.

participator therein. The Circuit Court of Appeals held that the evidence was entirely sufficient to justify the conclusion of the jury that Henry and Deluke conspired to devise the scheme to defraud, and that one or more overt acts were committed in the furtherance of the conspiracy. But the court also held that there was no evidence reasonably tending to show that Estep originally devised a scheme to defraud, or joined a conspiracy. It was contended by the government that he knowingly aided and assisted in the execution of the fraudulent scheme, and that he joined and adopted the conspiracy, and thereafter consciously participated therein by affirmative acts from which the jury was justified in holding him criminally responsible.

It is true, the court said, that guilty knowledge or criminal intent is usually a factual question for the jury, and is seldom provable by direct evidence, but must be inferred from facts and circumstances which reasonably tend to manifest a mental attitude. Quoting from *Direct Sales Co., Inc.* v. *United States,* 319 U. S. 703, the court said:

> "Without the knowledge, the intent cannot exist. . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal."

The Court then added:

> "Often the line between honest belief and purposeful misrepresentation is fine and indistinct; between the two however lies guilt or innocence, and where the evidence is evenly balanced between guilt and innocence, a conviction cannot stand."

The evidence against Curley was much weaker than that against Estep, but the proof in the two cases was, in some respects, strikingly similar. For example, Estep introduced Deluke to the members of his church and urged them to buy the stock of the various corporations. His intense interest in the venture greatly influenced the members of his church to purchase the stock. The court said that there could be no doubt that Estep was instrumental in the effectuation of a scheme which the jury found to be criminally fraudulent. But there was no direct proof tending to show

that Estep profited, or hoped to profit, from the sale of the stock except that it might benefit the church of which he was the founder and leader. He was subjected to the same sales psychology as the other members of his church, and his resistance was no greater.

Having recited more in detail what we have summarized, the court significantly said:

> "From the evidence, it is as reasonable to conclude that Estep was victimized by Henry and Deluke, as that he was a conscious participator in the fraudulent scheme or the conspiracy. We conclude that the verdict of the jury as to Estep is not supported by that degree of proof which we deem essential to a finding of guilty knowledge and criminal intent, and accordingly the judgment is reversed as to him."

In like manner, in this case it is as reasonable to conclude that Curley was victimized by Fuller, as that he was a conscious participator in the fraudulent scheme. It is my opinion, therefore, that the verdict of the jury as to Curley is not supported by that degree of proof which I deem essential to a finding of guilty knowledge and criminal intent, and accordingly I think the judgment as to him ought to be reversed.

My view of the evidence against Curley and of the sound and salutary principle of law which I think requires that he should go acquit is well stated in the dissenting opinion in *Warner* v. *United States*:[40]

"Coming now to the evidence tending to prove defendant's guilt under count 1 of the indictment, and what do we find? There is absolutely no direct or positive evidence. The sole reliance of the government is, and must rest upon, mere circumstantial evidence. . . . And how does he (the writer of the prevailing opinion) attempt to justify the fact that the circumstantial evidence found in the record is sufficient to support the conviction? On the thought that, to his mind, the circumstances in evidence, when compared, tend more strongly to sustain the guilt than the innocence of defend-

---

[40] 60 F. (2d) 700 (C. C. A. 10, 1932).

ant. As this position must depend more upon the cast of mind than upon the circumstances themselves, I had not thought such a view of a case could be taken. I had thought the rule to be, before circumstantial evidence proved anything, this evidence must arise to such dignity of proof as to exclude any and every other reasonable hypothesis than the guilt of the accused. I had thought this theory of circumstantial evidence was simple hornbook law, not needing any authority in its support. If it does, the books are full of cases laying down this rule, that circumstantial evidence which fails to arise to this high degree of proof is no evidence at all (*and*) [41] proves nothing.

"Such, to my mind, is the law and the rule to be at all times applied or the presumption of innocence with which a defendant stands before the bar of justice clothed by the law is not overcome. Who can say, who does say, in this case, the evidence in this case arises to such dignity as to exclude every other reasonable theory than the guilt of defendant?"

Even the majority opinion in the *Warner* case says that "substantial evidence was requisite that was more consistent with his guilt than with his innocence." [42] This is not in accord with the court's opinion in this case which squarely holds that the function of determining reasonable doubt *vel non* "is the jury's function, provided the evidence is such as to permit a reasonable mind fairly to reach either of the two conclusions." Such a statement is so far from being either safe or sound that I am unable to agree with the majority and must, with all deference, dissent.

---

[41] Patent omission supplied.

[42] In *Williams* v. *United States,* 78 U. S. App. D. C. 322, 140 F. (2d) 351, this court said:

> "To sustain it (the conviction) we should have to find, at least, that the evidence is more consistent with guilt than with innocence. Warner v. United States, 10 Cir., 60 F. (2d) 700."

[Stamp:] United States Court of Appeals for the District of Columbia. Filed Jan. 13, 1947. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

January Term, 1947

No. 9208

JAMES M. CURLEY, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee*

January Term, 1947

No. 9209

DONALD WAKEFIELD SMITH, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee*

January Term, 1947

No. 9215

JAMES G. FULLER, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee*

Appeals from the District Court of the United States for the District of Columbia

Before Edgerton, Wilbur K. Miller and Prettyman, JJ.

Judgment

These appeals came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and were argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgments of the said

District Court appealed from in these cases be, and the same are hereby, affirmed.

Per Mr. Justice Prettyman.

Dated January 13, 1947.

Dissenting opinion by Mr. Justice Wilbur K. Miller in No. 9208.

---

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

January Term, 1947

No. 9208

JAMES M. CURLEY, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*

Before: Edgerton, Wilbur K. Miller and Prettyman, JJ.

Order

On consideration of appellant's petition for rehearing filed herein, It is

Ordered by the Court that the petition be, and it is hereby, denied.

Per Curiam.

Dated February 4, 1947.

[Stamp:] United States Court of Appeals for the District of Columbia. Filed Feb. 4, 1947. Joseph W. Stewart, Clerk.

Excerpts from Arguments on Motion for Directed Verdict

Your Honor has considered, I am sure, and will consider further, the position in which the court finds itself with respect to these motions. I want to call to your Honor's attention something which perhaps your Honor has not had a chance to look at because of the form in which it finds itself. This is a decision of the Three-Judge Statutory Court sitting in this district, in the case of United States versus United States Gypsum Company. It was a special three-judge court in which Justice Stephens sat as presiding judge, with Judges Bland and Garrett sitting as the designated justices of the special statutory court.

• • • • • • •

Beginning on page 28 of this mimeographed copy of the (R. 2930) opinion——

The Court: What page?

Mr. Gallagher: Page 28. There are a number of preliminary matters discussed here before we get to the meat of this.

• • • • • • •

Referring to the Cady case in our Court of Appeals, the Court said, quoting from the Cady case:

> " 'We are reminded of the well-established and oft-repeated principle that, unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused, and, where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a conviction.' "

So we stand here upon this rule of law announced and reannounced by the Court of Appeals, that the question is not merely what substantial evidence there is, but that

the Court must decide that the evidence, even though substantial, excludes every other hypothesis but that of guilt.

The Court: That is a decision or a quotation from a decision from a court that I am not bound by. I think it is (R. 2931) the wrong statement of the law.

Mr. Gallagher: It is a quotation from the Cady case in the United States Court of Appeals for the District of Columbia—Cady versus United States.

The Court: What do they say?

Mr. Gallagher: They say:

> " 'We are reminded of the well-established and oft-repeated principle that, unless there is substantial evidence of facts which exclude every hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused.' "

The Court: I have been a judge for a long time, and this is the first time I have ever heard such a statement.

Mr. Gallagher: That is why I am calling it to your attention.

The Court: I should know all of those decisions of the Court of Appeals, but that is contrary to my understanding of what is the law. I understand it to be substantial evidence of guilt—that is, substantial evidence to support the allegations—and that is as far as the court goes on a motion for a directed verdict; and for the court then to tell the jury in consideration of the evidence that they must be convinced beyond a reasonable doubt of guilt, and that that necessarily excludes any reasonable hypothesis of innocence. But I think the court has gone too far there. (R. 2932)

* * * * * * *

The Court: I have never heard that cited before. I still cannot believe it is the law.

Mr. Gallagher: Let me go on with what the three-judge court says, not by way of authority but by way of argument here, as though it were a brief being filed with your Honor.

In Stilson *v.* United States, where the main contention upon appeal was that a motion for a directed verdict should

have been granted upon the ground that there was no substantial evidence to support a verdict of guilty, the court said—and this is in 250 U. S. at page 588:

> " 'As to the contention that there was no evidence to warrant the convictions of the accused—it must be borne in mind that it is not the province of this court to weigh testimony.' "

That is the very proposition your Honor has in mind.

> " 'It is sufficient to support the judgment of the District Court, if there was substantial evidence inculpating the defendants which, if believed by the jury, would justify the submission of the issues to it.' "

That is a statement of law with which your Honor and I are in accord.

The Court: That is the way we were taught. (R. 2933)

Mr. Gallagher: Now, in the development of that, referring to the Supreme Court cases again, the three-judge court said:

> "While Hays versus United States does both in ruling and terms, support the defendants' contention, it is from another circuit and it is therefore not controlling. While Cady versus United States and Stilson versus United States may perhaps be said, in using the phrase 'substantial evidence' without reference to the rule of proof in criminal cases and without statement that the evidence must be such that a verdict for the Government could be sustained, to lend some verbal countenance to the defendants' contention, in neither Stilson versus United States nor Cady versus United States was there presented and determined or discussed the exact question whether a trial judge, in deciding in a criminal case whether there is substantial evidence, passes upon the sufficiency of the evidence in the sense of determining whether it could convince a jury beyond a reasonable doubt. Hammond versus United States, 75 U. S. Appeals D. C. 397, 127 F. (2d) 752 (1942), authoritatively states the rule for and reflects what has long been the practice of trial judges in the District of Columbia in

determining in criminal cases the question whether there is substantial evidence for submission to a jury."

That was decided in 1942, may it please your Honor.

The Court: What case? (R. 2934)

Mr. Gallagher: The Hammond case—Hammond versus U. S., 75 Appeals D. C. 397.

• • • • • • •

After discussing the evidence, which I shall not discuss here, as I am going to submit this to your Honor, a directed verdict was asked for and was denied. It was renewed at the conclusion of the entire case and was again denied. On appeal it was held that it was error not to have directed a verdict. The Court of Appeals had pointed out elements which were necessary to be proved, including the purpose and intent, and then qouted from Isbell versus United States, 227 Federal 788, at page 792, in the Eighth Circuit, decided in 1915:

> " '. . . Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against (R. 2935) him.' (75 U. S. Appeals D. C. 398, 127 F. 2d at 753). "The Court then reviewed the evidence"—in the Hamond case—"as follows:
>
> " 'In the light of the circumstances we have related, we think it impossible that a jury of reasonable men could have fairly reached the conclusion that appellant, in what he did, necessarily intended to commit rape. True enough, his intent can only be determined by his acts.' "

Going on and discussing the facts which were present in that case, the Court concluded:

> " 'The above-cited cases and many others which might be cited are to the effect that to warrant conviction the evidence must show beyond a reasonable doubt

that intercourse was the immediate design and that force was intended to its accomplishment.' "

It said in this case that the evidence, not showing that to the exclusion of any other hypothesis except the presence of that design and that intent, the Court should have directed a verdict, and it reversed the lower court.

The three-judge court continues its opinion as follows:

"In Hammond versus United States the trial judge was confronted by evidence, the truth of which on the motion for directed verdict he was bound to assume, as to the circumstances under which the alleged assault with intent to commit rape occurred and as to how the defendant conducted himself. (R. 2936) But in determining whether the trial judge erred in his refusal to direct a verdict, the Court of Appeals, as indicated by the quotations above, not merely whether the evidence was substantial in the sense in which that word is used in civil cases, i.e., such as a reasonable mind might accept as adequate to support a conclusion, but also whether it was sufficient to convince beyond reasonable doubt. Therefore, the decision necessarily constitutes a ruling for this jurisdiction that a trial judge upon motion for a directed verdict at the close of the Government's evidence in a criminal case must not merely assume the truth of the Government's evidence and give the Government the benefit of legitimate inferences to be drawn therefrom, but must also consider whether or not the evidence, so regarded, could properly convince a jury beyond a reasonable doubt, and must, if he reaches a negative conclusion on this question, grant the motion."

They then discuss the rule in civil cases.

The Court: I think I get your point there. (R. 2937)

* * * * * * *

Mr. Busby: That brings me to a very recent case along this line. I shall repeat it in my own words. My own voice

always sounded better to me than anybody else when I was making a speech.

> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and, where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse the judgment against him."

The Court: Is that the Hammond case?

Mr. Busby: The Hammond case, at page 398 of 75 Appeals D. C. (R. 2964).

The Court: I have never yet done that (R. 2965).

* * * * * * *

I refrain, gentlemen, from any further comments. I think, in view of the fact that the case must continue, it is most appropriate that I should not elaborate upon the evidence or upon my reasons for the conclusions which I have just announced (R. 3142).

* * * * * * *

The Court: I have not said, of course, whether I thought the evidence was sufficient to justify a conclusion that any defendant was guilty beyond a reasonable doubt. I have not said either way. I denied motions to direct verdicts; that is (R. 3857) all I did.

Mr. Gallagher: Now, I am appealing to your Honor to put into effect the rule, which we consider a salutary rule, and to say at this time that your Honor could not find as a reasonable man from the evidence any hypothesis or any basis for saying that there is no other hypothesis than the hypothesis of guilt or that the evidence does not show as strongly a hypothesis of innocence on the part of the defendant Smith as it shows a hypothesis of guilt.

If your Honor follows that rule of law, then I am sure, in your sound wisdom and sound judgment, that your Honor would have to say that you could not be convinced by the evidence that there was more weight or more strength or

more virtue in the Government's hypothesis of guilt than there was in the hypothesis established by the presumption of innocence, the hypothesis that everything that was done and every piece of evidence here shows that the defendant Smith might well have been innocent and not guilty (R. 3858).

• • • • • • •

PROCEEDINGS AT TIME OF SENTENCING

The Deputy Clerk: The case of James G. Fuller, Donald Wakefield Smith, and James M. Curley—Criminal No. 73,085.

The Court: With reference to the case of Fuller, Curley, and Smith, it follows from my action in overruling the motions for a new trial that I have been unable to agree with the contentions of counsel for the defendants in connection with those motions.

• • • • • • •

Much was made of the fact that the defendants Curley and Smith were found guilty upon certain of the mail fraud counts, although the evidence did not show any direct personal acts upon their part in connection therewith. I have considered that question carefully, and I think it is true in some instances that the record does not reveal such a situation. Nevertheless, in view of the fact that these defendants were found guilty upon the conspiracy count, it follows quite logically that they could, on the rule of law, be properly (R. 3889) found guilty upon the mail fraud counts even though there was no immediate act upon the part of the respective defendants in the commission of such an offense. The jury were told of the rule of law, which was well recognized, that if they did find conspiracy prevailed among the defendants, that conspiracy by one would bind all upon the principle so well established with respect to such situations.

That, I think, is the logical and the legal theory upon which the jury did find guilt as to Curley and Smith upon such counts.

Without dealing more fully with the considerations entering into my action in overruling the motions for a new

trial, I wish to assure the defendants and their counsel that I have considered them very carefully and have been unable to find any just ground upon which I could properly interfere with the verdict of the jury. This leads me to the point where I must impose sentence. That is never a pleasant duty. Here, for reasons I need not detail, it is an extremely unpleasant duty, but one which I cannot honorably avoid.

In applying my mind and my conscience to the matter of fixing sentence, I have thought from the evidence, as well as from the nature of the verdict, that there was and is a difference in the measure and extent of guilt of the three defendants, and the sentences which I shall impose will reflect my best judgment as to the proper apportionment of (R. 3890) punishment with respect to such factors.

I think that is all I have to say.

I would first ask if counsel have anything to say in behalf of the defendants. If so, I shall be glad to hear them.

Mr. McKenzie: I would like to address the Court on behalf of the defendant Fuller.

If it please the Court, I would like to make this request first. Defendant Fuller is here, as you know, upon a writ ad prosequendum. As soon as you pronounce your sentence, the necessity for that writ ceases to exist, and he is then liable to be immediately returned to the penitentiary at Atlanta. If that should happen, I think it would greatly militate against his being able to prepare an adequate appeal, and I wish, if you could see your way to do it, sir, you would not quash the writ until such time as I am able to get the record straight and get the case into the Court of Appeals.

With respect to the actual sentence, I am, of course, as his counsel, greatly concerned with the matter of whatever sentence he may receive with respect to the element of time. He is presently serving a penitentiary sentence. There is no possibility that he shall be released upon bail in connection with that particular sentence he is serving as compared with the one he may soon receive.

Your Honor may recall that the instant offense is one (R. 3891) dating back some years ago; and, contemporane-

ously of the coming into existence of that offense, this defendant was sentenced in Brooklyn, New York, to a period of five years. Your Honor knows something about that case. We spent some time inquiring into it, and I think Your Honor stated that conditions which brought about the situation in which he found himself were such conditions as deserved the condonation of yourself, but of such nature that should not be permitted to happen again by the officials of the Department of Justice.

I think I have the right and duty to say to you some of the things that I have come to know about this defendant Fuller —and it is impossible to be so closely associated with him over a period of months not to know something about him, and especially with respect to this instant prosecution. I am convinced, if it please the Court, the idea of failure is utterly repugnant to that man at all times. I have never seen a man who has such an attitude of confidence. I am utterly convinced, beyond the shadow of a doubt, when he was operating in this Engineers' Group, that not only did he neglect to set up a scheme to defraud anybody—not only that that feeling was never present in his mind at any time —but I am sure he was convinced he could do not only the things he told these people he could do, but even on a grander scale. And I don't think, Your Honor, because he had a business failure, it is possible to tie that up with fraud or (R. 3892) criminality because he has some prior criminal record. The idea of setting up an enterprise for the purpose of filching some one out of money is a thought which I do not think ever entered his head. I think he could set up an enterprise and then, through failure of management and failure to observe closely the details, he could have a failure, a business failure, and one not predicated upon any preconceived plan to defraud any person or persons.

Now, before Your Honor passes sentence, I am going not to appeal to sympathy, which is pity not based on reason, but as you see this man here today, who has been a long time in the penitentiary, and only Your Honor knows how much longer he has to go.

Out of this whole world he has no one beside him except me, and I am not a very strong reed upon which to lean. On the other hand, the other defendants have the benefit and advantage of their friends and families; and at times like these I think it is a good thing to have some one beside you. And when this is over, as Your Honor has indicated, if these people are left on bail and left here to the solace of their homes and their families and friends, this man again will go back to a prison cell where he has long been, and I do not know how much longer he will there remain.

I am convinced, if this man receives any long period of incarceration, his mental deterioration will be so rapid his (R. 3893) physical deterioration will follow quickly. He has a quick mind, as seen in the evidence—wants to be doing things all the time. This restraint upon him, which is proper under the law, but different types of men react differently, and restraint upon that man is a terrific punishment; and I hope you will take all these things into consideration, and over the period of years I have dealt with you in this court, I have come to know you as a man, a humanitarian, and in this case I urge upon you to use your humanitarian principles in connection with justice, and I think it can be properly done.

I think the United States is not here seeking vengeance; I think it is seeking justice. They have presented their case and have obtained their verdict.

Before sentencing this man, I cannot urge upon your Honor too strongly to give him the benefit of every bit of mercy you can find consistent with your oath of office.

Thank you, sir.

The defendant himself seeks permission to address you.

The Court: I will be glad to hear him.

Mr. Fuller: I wish to state to Your Honor that from the beginning of this company to this day, Engineers' Group has never had any criminal fraud intent with any of the people connected with it, nor has there been such in my own mind, sir.

The Court: Is there anything further to be said? (R. 3894)

Mr. Gallagher: The defendant Donald Wakefield Smith

is a member of the bar of this Court and other courts, and has an established reputation in this community and in the country at large, and he seeks permission of the Court to speak to Your Honor very briefly.

He feels it is his duty to himself, to the Court, and to his family, to his business associates and to his clients, to make such a statement.

I think Your Honor has indicated you will hear anything the defendant has to say.

The Court: (To defendant Smith:) I shall be glad to hear from you.

Mr. Smith: I am wholly and unqualifiedly innocent of any wrongdoing whatsoever. I have had a lifetime reputation for honesty and integrity, for fair dealing, and that my professional conduct should be so impugned and so violated is beyond comprehension.

My conscience is clear.

The Court: Mr. Leahy?

Mr. Leahy: If Your Honor please, I believe at this time Governor Curley would like to say a few words to the Court, also.

I don't need to impress upon Your Honor the character or the reputation of Governor Curley. I think he belongs to the Nation more than he does to a State, and he certainly represents (R. 3895) everything that the State of Massachusetts has ever considered worthy of the highest honor that it could confer upon him as its Governor; the City of Boston, again and again as its Mayor; and even while this litigation was being tried publicly, up there during the campaign for his reelection to the United States House of Representatives, and again most hotly represented to the electorate during his campaign for mayor, he was returned by the greatest majority that has ever been known in the State of Massachusetts, by those who know him best.

He would like to protest publicly to Your Honor that he was never engaged in any scheme to defraud or entered into any conspiracy with anybody at any time or any place.

Am I right, Governor?

Mr. Curley: Yes.

The Court: I will be glad to hear from you.

Mr. Curley: I think it is regrettable that I should say a word here after having the services of what I consider one of the best attorneys in the United States, who presented this case in a most satisfactory manner; and after sitting here daily in your presence, sir, who I consider has acted with wisdom and with fairness throughout the trial of the case.

I firmly believe, if the true facts were known and understood by the jury, and if the jury had accepted of your (R. 3896) charge to them, they would have returned a verdict of "Not Guilty" in the case of myself and Mr. Smith, and possibly of the other man.

There is an old scriptural saying that "Out of evil cometh good", and perhaps out of the evil that might be reflected by a punishment in your order upon myself, good may result to other men who, like myself, come here to help frame the laws of the Nation.

I had the unusual experience of drifting into the Mayflower sometime in July, and being informed by a man whom I had met a number of times and who perhaps I regard as a friend wrongfully, who told me of the possibility of being of service to the Allies in the winning of the war.

At that time we were not a party to the war, sir, and did not become a party until in December, after Pearl Harbor. This was in July; not December.

He pointed out to me that there was a certain deposit in Utah known as alunite, and a certain other deposit in Seattle, and if these were developed it could save the country from U-boats, the U-boats being very busy in the Atlantic at that time. This was a substitute for bauxite, the basic metal for the manufacture of aluminum.

This man pointed out to me the possibility of saving some thirty million dollars by the manufacture of that product. I was shown a list of men throughout the country, which ranged (R. 3897) from Mr. Thach, attorney for American Aluminum Company—a list of men with salaries of $100,000—to the vice president of the Bohn Aluminum Corporation, second largest in the world; and to the Eisemann Magneto Company vice president, second largest

magneto company in the world; the president of the Chico Can Company of Los Angeles; George Eichelberger of the law firm of Stanfield, Levy and Eichelberger, the largest law firm in the world; and to his brother, Frank Eichelberger, who had the Sunshine Mine and Idaho Mine.

He said he had met the Eichelbergers and was on friendly terms with them; that he had met George Eichelberger and had asked him about Mr. Fuller. He said, "I think Fuller is one of the cleverest, most capable men I have met in my life." "I advise going in." He said, "We are going in." I checked up further and got the same kind of reports. I went in. I was not required to put up any money. I was offered to take the presidency.

I don't think there is any man in Congress or in the Country who would have refused to associate himself with a group of men who had been successful in business enterprises comprising a billion and a half dollars.

They proceeded with the formation of the company. They finally reached the point, somewhere in September, where it would require payment of about $750,000 to defray obligations. Suddenly, all the men possessed of money connected with the (R. 3898) Group withdrew. I had my suspicions why. The Aluminum Trust had been controlled most probably to take them over again.

I visited a movie house about nine months ago and saw the plant at Marysville, Utah, in operation, with about two hundred men working there. Underneath the picture it said, "This is the largest and most profitable plant operated by the Aluminum Company of America." That was one of the plants developed by Fuller.

I read in a trade report that the plant in Seattle takes 85 per cent of all electricity developed at Keokuk—twelve billion kilowatts of electricity.

These two plants are two of the most successful and richest in the possession of the Aluminum Trust.

When all these men nevertheless pulled out, all who were men of wealth, I ceased to take an interest in the company. I believe this man was honest.

And when war broke out, four of my boys went in the war; three of them in the Navy. They came through all

right. And do you think, Your Honor, that I would be a party to doing anything to jeopardize the lives of my own children? I would be unworthy to be called an American if I were guilty of anything of that kind.

Then came the election—they had a recount; had application to the courts for an examination of the voting lists—if you believe the election was stolen. This took (R. 3899) up all of my time. I had no interest in these contracts; in the engineering. The trouble is, sir, I rather followed that line of Ralph Waldo Emerson, "To have a friend you must be one." I have been a friend of the people, if I might use that term—a rather hackneyed one—about forty-eight years.

To find myself, at the age of 71, going on 72, before this Court, with four boys coming out of the war, with good records, with another boy studying for the priesthood, and with my own physical condition so impaired that I am going to the Naval Hospital at three o'clock, if permitted to leave here—I say to you, Your Honor, that if the facts were known to you, if you could look inside my mind, inside the minds of the people who know me best, where I have lived all my life, where I was born.

Mr. Leahy mentioned the late election. My opponent was a very good man, sponsored by all the farm organizations and religious societies, and the only thing discussed in that campaign from beginning to end was this case here; and I never once made answer. I allowed the people to judge me, and they returned me by a larger vote than anyone ever received in the City, to Mayor—almost equal to that received by all of my opponents. They do not do those things unless they have faith and confidence, and that built up over the years.

I have never begged for mercy, Your Honor; never begged for charity. I do not do it now. I simply say, if justice (R. 3900) is to be done, I have faith in you, sir. I have said during the conduct of this case I believe you eminently capable and fair. I think you are still capable of doing justice, knowing the facts.

Thank you.

The Court: If the defendants will come to the bar, please.

(Defendants with their counsel stood at the bar.)

The Court: Statements of the defendants and their counsel have only added to the unhappy duty I have to perform.

In view of the jury's verdict, which I have upheld, it is my duty to accept that verdict and the necessary implications that follow from it, which include consideration of the evidence upon which they necessarily acted, with the inferences arising therefrom.

It is unusual for me to judge of the guilt or innocence of men who are tried before me and are convicted. That is the function of the jury, and I do not belabor my mind with attempting to judge my fellow man unless it is necessary—certainly not to condemn, unless the duty falls upon me. But as counsel know, in view of the developments of this case and the rulings which my judgment and my conscience have dictated, I must necessarily act upon an assumption of defendants' guilt.

Without saying more—(R. 3901).

As to the defendant Fuller, there will be a sentence of from eight months to two years on Count Sixteen, which is the conspiracy count, to take effect after the expiration of any sentence or sentences he is now serving. In addition, there will be a sentence of from eight months to two years on the other counts of the indictment, which are the mail fraud counts upon which he was convicted, to take effect after the expiration of the sentence just imposed.

As to the defendant Curley, the sentence will be from six months to one year and six months, and a fine of $1,000.

As to the defendant Smith, the sentence will be from four months to one year and one day, and a fine of $1,000.

The sentences as to the defendants Curley and Smith are placed generally upon all the counts upon which they were convicted.

Now, I have indicated to counsel, and I think it proper I should make a public statement of it, that I shall permit the defendants Curley and Smith to remain on bond. Counsel have given me their assurance that there will be an appeal in this case. They have given me their assurance that they

will expedite that appeal, and will not ask for any extensions or delays in preparing the record on appeal.

In view of those things, as well as other considerations which properly should be taken into consideration, I feel justified in permitting these two defendants to remain upon (R. 3902) bond; and that will be done.

Frankly, I want an appeal in this case. I have told counsel, though I have acted to the best of my judgment and ability, I appreciate the fact that there are some rulings as to which other men may differ; and in view of that, I much prefer that other jurists as competent or more so than myself may take this record and pass upon it before the defendants actually suffer any punishment I have imposed (R. 3903).

• • • • • • •

# INDEX



## CITATIONS

Cases:

# In the Supreme Court of the United States

OCTOBER TERM, 1946

---

No. 1211

JAMES M. CURLEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

No. 1235

DONALD WAKEFIELD SMITH, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (App. 54–79)* have not yet been reported.

*The designation App. refers to the appendix to the petition for certiorari on behalf of petitioner Curley. The designation R. refers to the typewritten transcript of record on file in the office of the Clerk of this Court.

## JURISDICTION

The judgment of the Court of Appeals (App. 80–81) was entered January 13, 1947. A petition for rehearing on behalf of petitioner Curley was denied February 4, 1947 (App. 81), and a petition for rehearing on behalf of petitioner Smith was denied February 20, 1947 (Smith Pet. 61). On February 27, 1947, the Chief Justice extended Curley's time to file a petition for a writ of certiorari to April 5, 1947, and his petition was filed on that date. On March 22, 1947, the Chief Justice extended Smith's time to file a petition for a writ of certiorari to April 11, 1947, and his petition was filed on that date. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

## QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioners' convictions.

2. Whether petitioner Curley's testimony in supplementary proceedings that he had received money from the Engineers' Group was properly admitted in evidence against him to show such fact.

3. Whether it was proper to admit, against petitioner Smith, evidence of acts of co-conspirators in furtherance of the conspiracy performed before Smith joined the enterprise.

4. Whether it was prejudicial error to exclude a group of 20 exhibits offered en masse on behalf of Smith after the evidence had been closed.

STATEMENT

Petitioners were convicted on a number of counts of an indictment returned against them and others in the District Court of the United States for the District of Columbia, charging use of the mails in execution of a scheme to defraud and conspiracy so to use the mails (App. 1–52; R. 3755–3757). Petitioner Curley was sentenced to imprisonment for a term of six to eighteen months and to pay a fine of $1,000, and petitioner Smith was sentenced to imprisonment for a term of four months to a year and a day and to pay a fine of $1,000 (R. 3902). On appeal, the judgments were affirmed (App. 80–81), one judge dissenting as to Curley on the ground that the evidence was insufficient to support his conviction (App. 71–79).

The evidence for the Government may be summarized as follows:

A. *The scheme to defraud.*—It is not disputed that the evidence amply established a scheme to defraud and the use of the mails in execution thereof in the operations of Engineers' Group, Inc., under the active management of the defendant Fuller. The Group began to function about June 26, 1941 (Gov. Ex. 5, R. 1431), although it was not actually incorporated until October 31,

1941 (Gov. Ex. 103, R. 1383). It had completely disintegrated by February 1942 (R. 1398–1399, 1441).

In general, the evidence showed that the Group was represented as being in a position to secure government contracts for construction work and later for conversion to war work. Various corporations were induced to pay an initial deposit as part of a fee for securing contracts under agreements providing that the fee would be returned if a contract was not obtained, and numerous misrepresentations were made to induce the payment of fees. No contracts were obtained and, except in a few instances, the money received as deposits was never returned.

Typical of the manner in which deposits were obtained from construction companies was the experience of John Ruff, a builder in Baltimore, Maryland (R. 173). In November 1941 Fuller told Ruff that the Engineers' Group was composed of outstanding men with the prestige required to obtain contracts for important housing projects, mentioning Curley as one of such prominent members (R. 385). Fuller also told Ruff that the Beverly Terrace project at Alexandria had been approved by the F. H. A., and that a lending institution was ready to loan money for the project (R. 384–385, 386–387). On November 18, Ruff entered into a contract with Fuller, paying him $5,500 as an initial fee (R. 389–390, Gov. Ex. 9

and 10, R. 392). The contract contained representations that the Beverly Terrace Housing project had been approved by the F. H. A. district office and that commitments had been made by the Central Life Branch of Washington, D. C. There were also provisions to the effect that the deposit was to be held as security and was to be returned if no suitable contract for the construction work was tendered to Ruff (Gov. Ex. 9, R. 392). No contract was ever offered to Ruff (R. 408). On January 14, 1942, Ruff demanded the return of his $5,500 (Gov. Ex. 21, R. 407), but the money was never returned (R. 408). The representations as to commitments by the F. H. A. and the lending institution were false (R. 2379–2381).

A number of other witnesses testified to substantially similar transactions. La Rocca (R. 180–260) entered into a number of agreements with the Group on false representations as to commitments by lending institutions (cf. Gov. Ex. 23, R. 197–198; Gov. Ex. 25, R. 211; Gov. Ex. 29, R. 224; Gov. Ex. 36, R. 240, with R. 2381, 2733, 2738–2739, 2501–2502, 2543, 2379–2381). J. W. Bishop Company paid $3,100 under an agreement containing false representations regarding commitments on a project known as Alexandria Village (cf. Gov. Ex. 43, R. 476, with R. 2292, 2298), and $2,500 on a bank building falsely alleged to have been approved by the District Commissioner (cf. Gov. Ex. 47, R. 497, with R. 2381, 2497,

2794, 2798). Powers paid $2,500 on the same bank building project (Gov. Ex. 50, R. 639). Rocheford deposited $3,580 on false representations that commitments had been made on a project known as the Colebrooke Housing Development (cf. Gov. Ex. 60, R. 730, with R. 2307). Schweers and Smith also paid $3,580 on the Colebrooke project (R. 1137–1138).

An example of the operations of the Group in connection with conversion for war work was the experience of Harold Forse, president of the Forse Corporation (R. 1217). He met Fuller and petitioner Smith at the Blackstone Hotel in Chicago on December 6, 1941 (R. 1220). Fuller told Forse that the Engineers' Group was composed of men who knew how to secure contracts, men experienced in ordnance work, and engineers able to assist in conversion (R. 1221). He mentioned Curley as the head of the company (R. 1222). Fuller implied that a fuel injector developed by Eisemann Magneto had been placed in the hands of the Group for development (R. 1224). He stated that the Engineers' Group had total assets of between $200,000 and $300,000 (R. 1229, 1230–1231), and had $10,000 on deposit at the Pilgrim Trust Co. in Boston (R. 1249). Later that month, at a meeting with Fuller and Smith in Washington, Forse was given a prospectus of the Group (R. 1240–1241; Gov. Ex. 94, R. 1245). The prospectus represented that the Group had "personally planned and supervised over $100,000,000 of

construction in the last twenty years"; that through their banking facilities, they could "obtain accommodations up to $1,000,000 working capital"; that they were consultants for a number of construction and industrial companies, engineers, and architects; that "construction awards total about 800 houses * * * consisting of about $4,000,000." When Forse told Fuller that the Pilgrim Trust Co. had reported that there was no money on deposit to the credit of the Group, Fuller purported to call an official of the bank on the phone and berate him (R. 1249). On December 19, Forse, on behalf of his company, entered into a contract with Engineers' Group, paying $3,750 in cash and giving a note for $3,750 as a retainer (R. 1252; Gov. Exs. 95–97, R. 1255). Subsequent to the execution of the contract, two engineers visited the plant of Forse's company, remaining there about three hours (R. 1257–1258, see R. 1821). Forse discussed with Fuller a number of different types of possible contracts (R. 1250–1251, 1259–1260, 1265), but no contract was ever tendered to the company, although efforts were made to get it a subcontract from Willys-Overland (R. 1265, 1307–1308). The money paid as a retainer was never returned (R. 1271).

In substantially similar manner, fees were paid to the Engineers' Group in the expectation of receiving war contracts by the Glenwood Range Co., of Taunton, Massachusetts ($5,000) (Gov.

742774—47——2

Exs. 79, 80, R. 1024, 1032; see R. 1018–1036); the Norcor Corporation, of Green Bay, Wisconsin ($7,500) (Gov. Exs. 69, 70, R. 836; see R. 821–843); and Advertising Metal Display Co., of Chicago, Illinois ($7,500) (Gov. Exs. 158, 159, R. 2669; see R. 2656–2675). Other witnesses testified that they had been solicited on the same basis but had declined to enter into an agreement with the Group (R. 1444–1450, 1511–1522, 1944–1961, 1986–1998, 2015–2022, 2118–2121). It was represented to one or more of these firms that Engineers' Group employed a staff of trained engineers (R. 1030, 1517, 1949, 2663), whereas, in fact, the group merely employed one Major Hawkins for a short period and had him make a survey of the Forse and Glenwood plants, failing, however, to pay him all that was due him (R. 1798–1821). The Group apparently also hired another firm which sent out two engineers to make brief surveys of the Norcor and Advertising Metal plants (R. 830, 2674). One of the firms solicited by the Group obtained a Dun and Bradstreet report on the company (R. 838). That report was prepared on the basis of information supplied by Fuller (R. 928–930, 933; Gov. Ex. 71, R. 933; Gov. Ex. 72, R. 945), showing a surplus of approximately $250,000, which was nonexistent (see R. 1415–1417, Gov. Exs. 168–172, R. 2847). The prospectus of the Group, which, as set forth above, was false in every material respect, was shown to several of the companies

(R. 1958–1959, Gov. Ex. 127, R. 2140; Gov. Ex. 81A, R. 1035, 1037).

Although the corporation was represented in its financial report as having a capital stock of $20,000 (Gov. Ex. 81B, R. 1037), no capital was ever put into the enterprise (R. 1417). The only source of income was the deposits obtained from persons for whom contracts were to be obtained (Gov. Ex. 108, R. 1418; Gov. Ex. 171, R. 2847). In all, the Group collected approximately $67,000 from various corporations and refunded only $9,600 (Gov. Ex. 108, R. 1418; Gov. Ex. 172, R. 2847). No contract was ever obtained for any of the clients. By February 1942, the Group had been abandoned by its officers, Fuller had disappeared, and the one remaining employee levied on the furniture for his unpaid salary (R. 1398–1399, 1441, 1643). The group owed money for rent (R. 147–149), owed money to the Sherry-Netherlands Hotel in New York (Gov. Ex. 116, R. 1705), and had numerous checks outstanding against it, although its bank balance was only $8.00 (Gov. Ex. 6, R. 1434; Gov. Ex. 7, R. 1438).

B. *Participation of Curley.*—Curley was the president and a director of the Group from its inception until he resigned (Gov. Ex. 153, R. 2485).[1] He represented himself as being con-

[1] The exact date of Curley's resignation does not appear in the record. Gov. Ex. 153, R. 2485, shows Curley as president on Dec. 15, 1941, and Gov. Ex. 154, R. 2485, records the resignation of the defendant Underwood as president in Feb. 1942.

nected with the organization in the period prior to actual incorporation (R. 465, 630, 666, 2040–2042, 1134, 1168–1169), and his connection with the Group was constantly mentioned to persons who were solicited to do business through it (R. 184, 385, 635, 1027, 1134, 1993, 1222, 2021, 2121; see also R. 1823–1824).

In July 1941, Curley arranged for the opening of a bank account for a member of the Group at the Pilgrim Trust Company in Boston, stating that he, Curley, was connected with the Group (R. 2040–2042). He also endeavored to have the bank make a loan to Engineers' Group as such to be held as a frozen deposit, i. e., with the understanding that no money could be drawn thereon, but that the bank would certify to persons making inquiries that the Group had such a sum on deposit (R. 2043).

George E. Rocheford, vice president of a contracting firm of Worcester, Massachusetts (R. 719–720), was introduced to Curley and Fuller in July 1941 by Desmond, a co-defendant (R. 722) as to whom the case was severed because of his illness (R. 4–8). At the meeting, Curley stated that the Rocheford Company was a well known firm of contractors (R. 722). Fuller said that the Group handled several jobs in various parts of the country involving large sums of money, and that he would investigate the capacity of the Rocheford firm (R. 723). On August 12, 1941,

Rocheford and Desmond went to Washington and discussed with Fuller the proposed Colebrooke housing development (R. 725–726). The next day, when a tentative agreement was discussed and executed, and a fee of $3,580 paid, Curley was in the room (R. 727, 730–733).

William P. Haskell, representing the contracting firm of Schweers and Smith (R. 1129–1131), went to the office of the Engineers' Group in Washington in July 1941 (R. 1132–1133). Fuller introduced him to Curley (R. 1133, 1167). They talked for some time about a proposed project at Fort Reynolds (R. 1167–1168). Curley then left, saying, "I am leaving this matter in Mr. Fuller's hands" (R. 1134, 1168–1169). Schweers and Smith entered into an agreement with the Group, paying $3,580 in the expectation that they would be awarded a contract for the Colebrooke project (R. 1137–1138; Gov. Exs. 82, 83, R. 1141–1142). In October 1941, when Haskell met Curley by chance in Boston, Curley asked him how he was getting along, and Haskell said he would be glad to see some action. Curley replied, "I will take it up with Mr. Fuller and see if we can't get it started." (R. 1144–1145.) Early in January 1942, Haskell met Curley and Fuller at a dinner in Washington, and Curley said, "I think you will find Jim [Fuller] can work things out" (R. 1145). Subsequently, the amount of their deposit was returned to Schweers and Smith (R. 1146).

In August 1941, Frank M. Gifford, a contractor of Worcester, Massachusetts (R. 461–462), was introduced to Curley in Boston by Desmond (R. 464). Curley inquired about the equipment of the Gifford company and asked whether they were capable of handling other construction work (R. 465). Curley then made a telephone call, and upon his return he told Gifford that Fuller, "their man in Washington," was about to leave for New York, that he had a prospect that was all ready to materialize, and that it would be desirable for Gifford to meet Fuller in New York that very evening (R. 465–466). Gifford did meet Fuller in New York (R. 468). On August 12, Gifford entered into an agreement with the Engineers Group, whereby his company paid $3,100 in the expectation that it would be awarded a contract for the construction of houses at Alexandria Village (R. 475–476; Gov. Ex. 43, R. 476).

John W. Powers, another Massachusetts contractor (R. 627), also met Curley through Desmond (R. 629). Curley told him that the Group "had several jobs and several contracts and they needed contractors to do them"; that if Powers were interested, he would introduce him to Fuller (R. 630, 666). He said that Fuller was a "live wire" and had a lot of construction work (R. 631, 666). Curley arranged to meet Powers in Washington (R. 631). Powers did meet Curley and Desmond in Washington, and Desmond took Pow-

ers to the offices of the Group (R. 632). Powers entered into an agreement with the Group, paying $2,500 in the expectation that he would be awarded a contract for the Hamilton Bank Building (R. 633, 636–637; Gov. Ex. 50, R. 638–639). Curley was present in the office during one of Powers' meetings with Fuller but did not enter into the discussion (R. 654). Powers lost interest in the project, and tried to stop payment on the check, but it cleared by mistake (R. 645–646). He tried to collect the money from the Group (R. 646, 648–649), and in the course of these negotiations telephoned Curley several times (R. 650, 652, 685–686). Curley said that he would talk to Fuller and try to have the money sent (R. 650, 652, 685). The money was never repaid (R. 646).

In the summer of 1941, when Fuller was trying to get one Edward Turgeon to pay $25,000 for a contract for the construction of an aluminum factory (R. 2119, 2121), Curley was in the room when Fuller discussed the details of the project and the proposed fee (R. 2122–2123).

In December 1941, Harold Forse, whose dealings with the Group have been set forth at pp. 6–7, *supra*, met Curley in the anteroom of the Group's office while waiting for Fuller during the period when they were carrying on the negotiations which eventuated in the signing of a contract. Curley told Forse that "he was waiting on a telephone call to a young man" who had,

after a great deal of trouble, developed a method of making high octane gasoline, and that he had helped the young man secure a trial order that would enable him to build a small plant (R. 1238–1239).

In December 1941, while Hawkins was employed by the Group to make a survey of the Glenwood plant (see p. 8, *supra*), he met Smith, Fuller, and Desmond in Boston (R. 1812). On December 13, they drove to the Glenwood plant (R. 1814). Curley rode in the car with Hawkins, but did not go to the plant (R. 1814). He joined the group at the local inn and later entertained them at his home (R. 1815–1816). Curley and Fuller seemed to be on very cordial terms (R. 1816, 1905). The next day, Fuller told Hawkins that Curley had suggested that they survey another plant near Boston, and Hawkins was driven there by Curley's chauffeur (R. 1817). Curley, Fuller, Hawkins, and Smith returned to Washington together (R. 1818).

In December 1941, Curley was examined in supplementary proceedings in Boston. He was questioned about a transaction on August 8, 1941, in which he gave the Hibernia Savings Bank of Boston, $3,500 in cash (R. 3177–3178, 3180).[2]

[2] The money was paid to take up a check which had not cleared, made by Irving Newcomb, Inc. to the order of James Fuller and endorsed by Fuller. That check, in turn, had replaced a check endorsed by both Fuller and Curley (R. 3152–3153).

Curley said that he "seemed to act as a messenger or agent in the transaction"; that he received the $3,500 from an official of the Engineers' Group in Washington, whom he subsequently identified as Fuller (R. 3180, 3182). He described the Group as "an advisory body of engineers that transacts business," and stated that he had business relations with the Group (R. 3180). He said that the $3,500 was paid to the bank to take up a check of the Engineers' Group which he had previously received in Washington and had forwarded to his wife to cash (R. 3182). When asked the nature of his business association with the Group, Curley replied, "I would say I worked with them in the development of business" (R. 3182). He said the $3,500 check was originally given to meet "certain obligations" to him (R. 3182). He also said he was a stockholder in the corporation (R. 3182) and that he used part of the $3,500 to pay his local bills (R. 3183).

C. *Participation of Smith.*—Smith acted as treasurer of the Engineers' Group and as a director from December 15, 1941, to February 15, 1942 (Gov. Exs. 137A, 137B, 137C, R. 2059; Gov. Ex. 117, R. 1710). One exhibit shows him as treasurer on December 3, 1941 (Gov. Ex. 137A, R. 2059).

On November 29, 1941, Hamilton, of the Forse Corporation, was told by Smith that he "had or expected to become associated with an engineer-

ing group interested in the placement of contracts for defense work." In answer to a question by Hamilton, Smith stated that a fee for a government contract was permissible provided it covered engineering services and provided such a fee was stipulated and set forth in the contract. (R. 1368–1370.) On December 6, 1941, Smith was with Fuller at the Blackstone Hotel in Chicago when Fuller entered into the negotiations with Forse described at p. 6, *supra* (R. 1220–1222). Smith was also present at the meeting with Forse in Washington, at which Forse was given the Group's fraudulent prospectus (R. 1240–1241). As Forse was about to leave Washington, he recalled that he had inadvertently neglected to sign the check given to the Group, and he telephoned Fuller, stating that he would send another check or try to have the one he gave honored. Smith took the check to the railroad station for Forse to sign (R. 1255–1256).

William Hays Forster, a Pennsylvania manufacturer, met Smith on January 19, 1942, through a N. L. R. B. representative who was conducting an election at the plant (R. 1442–1443). Smith told Forster that he thought his company was in a position to manufacture airplane parts, and that "they felt quite sure that with their connections they could get us this war work" (R. 1445). The next day, Smith, accompanied by several other people, went to the plant and discussed the terms of

a contract, asking 6 per cent. of the gross and a down payment of $7,000 (R. 1447–1448). Smith said that they had obtained contracts for another company (R. 1449). Forster declined to enter into an agreement (R. 1450).

Wallace W. DeLaney of the Faultless Rubber Co. had learned of Smith through a representative of the N. L. R. B. in June 1941, and had corresponded with Smith from June to August 1941 (R. 1508–1511). In January 1942, DeLaney met Smith at the offices of the Engineers' Group in Washington (R. 1511–1512). DeLaney took notes of their conversation (Gov. Ex. 110, R. 1514–1515). Smith said that the Group wanted a fee of 6 per cent. with an advance payment of $7,500 for engineering services, the money to be returned if no business was received (R. 1516–1517). Smith stated that if new equipment were needed the Group would obtain materials and supply A–1 priorities (R. 1518), and would train employees for the new type of work (R. 1519).

Donald MacGregor, an electrical and radio manufacturer, met Smith at the Blackstone Hotel in Chicago on December 6, 1941 (R. 1945–1946, 1949). They had a discussion about war contracts, and Smith was very sanguine about his ability to help MacGregor, stating that "they had done so with others who had substantially the same facilities" (R. 1946–1947). Fuller came into the

room while Smith and MacGregor were talking, and suggested that MacGregor enter into an agreement on a retainer of $15,000, the money to be returned if no business was obtained (R. 1951, 1953). Fuller said he and his group had been able to get government contracts (R. 1954). MacGregor asked for a prospectus of the Group and one was delivered to him the next day (R. 1958).

In December 1941, Fuller went to the APCO-Mossburg Co. seeking to have them manufacture .37 mm. shot (R. 2449). The president of the corporation offered to sell him the company for $500,000, and Fuller seemed interested (R. 2451). Fuller and Smith had a conference with the president of the corporation in New York, and talked over the possibility of the sale, giving the president to understand that the money was on deposit in a bank in New York (R. 2454–2455).

Ralph T. Scantlebury, an officer of the Toycraft Rubber Co., was referred to Smith by one Blackmore, an employee in charge of labor relations, who had formerly been associated with Smith (R. 1986–1987). On December 29, 1941, Scantlebury and Blackmore called on Smith at the offices of the Engineers' Group in Washington, and there met Fuller (R. 1987–1988). Fuller stated that the Group was taking over the APCO-Mossburg Co. to make shells for the Russian Government, and that it was necessary to move the machinery out of the Mossburg plant (R.

1989). He sought to have Scantlebury sign a contract with the Group, stating that the Mossburg machinery would be moved to the Toycraft Co. at a nominal cost to be used by Toycraft in filling war contracts to be obtained by the Group. Fuller asked Scantlebury for a down payment of about $5,000 and 6 percent commission on orders. (R. 1990–1991.) In talking with Smith, Scantlebury took exception to the request for a down payment, stating that his company's financial status could easily be ascertained (R. 1995–1996). He testified that he said to Smith, "What do we know about you?" and that Smith replied, "Well, they don't make any pretense of carrying any balances because they cut their dividends quite frequently and in sizeable quantities" (R. 1996).

As treasurer, Smith was in a position to know the precarious financial position of the Engineers' Group in December 1941 and January 1942. The bookkeeper testified that he told Smith "any time he wanted to know, practically daily, how much money the books showed was in the bank" (R. 1408; see also R. 1661–1662). On December 17, when Smith took over the office of treasurer, the balance was $115.55, and the first checks written by Smith were for $502.30 to Hawkins and one to Smith himself for $200 (R. 1658). In December 1941, Smith tried to get the Pilgrim Trust Company of Boston to lend the Group from $15,000 to $25,000 as a frozen deposit without the

right to draw thereon (R. 2064).[3] A number of checks returned for insufficient funds were signed by Smith (R. 1651; Gov. Ex. 7, R. 1438). Smith wrote checks representing some of the few deposits that were returned to clients, and thus was in a position to know that contracts had not been obtained as promised (R. 500, 505; Gov. Ex. 48, R. 505; Gov. Ex. 87, R. 1152; Gov. Ex. 105, R. 1413; R. 1653).

**ARGUMENT**

1. Faced with the knowledge that this Court will not ordinarily review the sufficiency of evidence to support a conviction, petitioners have endeavored to transform an attack on the sufficiency of the evidence into a legal question of the proper functions of the trial court on a motion for a directed verdict and of the appellate court on review (No. 1211, Pet. 10–51; No. 1235, Pet. 14, 15, 22). The difficulty with their approach, however, is that the questions which they argue so vigorously have already been definitively answered by this Court. In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, one of the defendants sought reversal of his conviction on the ground that there was no substantial evidence that he had knowledge of or participated in the unlawful

[3] The president of the bank could not identify Smith from the stand, but testified that Smith was sent in through Curley and left his signature card on December 17, 1941 (R. 2064–2065). The testimony of Hawkins shows that Smith was in Boston at that time (R. 1812–1818).

conspiracy. He had raised the question by a motion of a directed verdict at the close of the case, and in this Court relied upon the doctrine of *Isbell* v. *United States*, 227 Fed. 788 (C. C. A. 8), upon which petitioners here also rely (see Supplemental Brief on behalf of McElroy, Nos. 346–347, Oct. T. 1939). This Court said (310 U. S. at 254):

> * * * His motion for a directed verdict at the conclusion of the case was denied by the trial court and the Circuit Court of Appeals held that there was no error in such denial. A question of law is thus raised, which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict. *Abrams* v. *United States*, 250 U. S. 616, 619; *Troxell* v. *Delaware, L. & W. R. Co.*, 227 U. S. 434, 444; *Lancaster* v. *Collins*, 115 U. S. 222, 225.

See also *Glasser* v. *United States*, 315 U. S. 60, 80; *Gorin* v. *United States*, 312 U. S. 19, 32; *Pierce* v. *United States*, 252 U. S. 239, 251–252; *Stilson* v. *United States*, 250 U. S. 583, 588–589. Obviously, if substantial evidence is the proper test by which to judge the action of the trial judge in permitting a case to go to the jury, it is the proper test for the trial judge to apply on a motion for a directed verdict.

Almost every circuit court of appeals in the country has held that in situations where a finding of guilt depends on the inferences to be drawn from the circumstances proved, the determination whether such circumstances are sufficient to establish guilt beyond a reasonable doubt is for the jury and not for the court. *Morton* v. *United States,* 147 F. 2d 28, 30 (App. D. C.), certiorari denied, 324 U. S. 875; *Yoffe* v. *United States,* 153 F. 2d 570, 573 (C. C. A. 1); *United States* v. *Valenti,* 134 F. 2d 362, 364 (C. C. A. 2), certiorari denied, 319 U. S. 761; *United States* v. *Picarelli,* 148 F. 2d 997, 998 (C. C. A. 2); *United States* v. *Brandenburg,* 155 F. 2d 110, 112 (C. C. A. 3); *United States* v. *Reginelli,* 133 F. 2d 595, 599 (C. C. A. 3), certiorari denied, 318 U. S. 783; *Roberts* v. *United States,* 151 F. 2d 664, 665 (C. C. A. 5); *Whaley* v. *United States,* 141 F. 2d 1010 (C. C. A. 5), certiorari denied, 323 U. S. 742; *Blalack* v. *United States,* 154 F. 2d 591, 594 (C. C. A. 6), certiorari denied October 14, 1946, No. 232, this Term; *United States* v. *Levy,* 138 F. 2d 429, 430-431 (C. C. A. 7), certiorari denied, 321 U. S. 770; *Braatelien* v. *United States,* 147 F. 2d 888, 893 (C. C. A. 8); *Hansbrough* v. *United States,* 156 F. 2d 327, 329 (C. C. A. 8); *Gorin* v. *United States,* 111 F. 2d 712, 721 (C. C. A. 9), affirmed, 312 U. S. 19; *Scott* v. *United States,* 145 F. 2d 405, 408 (C. C. A. 10), certiorari denied, 323 U. S. 801; *Rogers* v. *United States,*

129 F. 2d 843, 844 (C. C. A. 10). It is to be noted that in this group of cases are included decisions, subsequent to those cited by petitioners, in the very circuits which petitioners contend apply a standard different than that held applicable in the decision below. If, therefore, there ever was a conflict between the decision below and the decisions in other circuits, that conflict has long since been resolved.

Actually, however, there is no conflict. When examined in relation to their facts, it is clear that the decisions relied upon by petitioners hold no more than that a verdict of acquittal must be directed if the evidence, taken in the light most favorable to the Government and with all possible inferences drawn in favor of the Government, is still as consistent with innocence as with guilt.[4] Those decisions do not hold that, where the inferences that reasonably can be drawn from the Government's evidence may establish guilt beyond a reasonable doubt, a verdict of acquittal must be directed merely because, by indulging in every possible inference in favor of a defendant, it is possible to devise an innocent explanation of defendant's conduct. If that were the rule, no case in which any inference must be drawn by the jury could stand. See *United States* v. *Valenti*, 134

[4] That this was the rule actually applied by the trial court is shown by its action in directing a verdict of acquittal as to two of petitioners' codefendants (R. 3141).

F. 2d 362, certiorari denied, 319 U. S. 761, *supra*.

Here the evidence establishes that petitioners lent their names and the prestige acquired through public office to an enterprise which they knew had no financial stability. They continued to be active in the enterprise when they knew that the promises made were not being kept. They made statements to prospective customers which were false and which they either knew or should have known were false.[5] Given its kindest interpretation, such evidence establishes that reckless disregard of truth or falsity which in law has always been considered the equivalent of willful intent to defraud. *Pierce* v. *United States*, 252 U. S. 239, 251; *Cooper* v. *Schlesinger*, 111 U. S. 148, 155; *Baker* v. *United States*, 115 F. 2d 533, 541 (C. C. A. 8), certiorari denied, 312 U. S. 692; *Stunz* v. *United States*, 27 F. 2d 575, 579 (C. C. A. 8); cf. *Screws* v. *United States*, 325 U. S. 91, 103–104, 130. Given its most obvious interpretation, it clearly justifies a finding of knowing and informed participation in a criminal enterprise. In this connection, it should be noted that the jury must have found actual participation, and not merely reckless conduct, for the trial judge, in an

[5] The brief on behalf of petitioner Smith neglects to set forth statements definitely attributed to him by various government witnesses (see Statement, *supra*, pp. 16–19). The fact that these witnesses declined to enter into contracts with the Engineers' Group does not lessen the probative force of their testimony.

instruction probably more favorable to the defendants than the law required, charged (R. 3740):

> As to count 16, as well as the mailing counts, guilt does not attach to one who merely knows of a criminal conspiracy or enterprise, or of acts in furtherance thereof, even though done in his presence. A passive knowledge or attitude is not enough. There must be not only knowledge, but also actual and conscious union with the criminal group. Therefore, official connection with Engineers' Group, Incorporated, suspicion or knowledge or [sic] an unlawful plan or purpose among others in the group, if such there were, carelessness or indifference to the duties of an office, inattention to details of its affairs, or overconfidence in other officers or agents of the organization will not of themselves suffice to make one a party to a criminal conspiracy in connection with the conduct of its business. Besides knowledge of such a criminal scheme, there must be a positive intention to give adherence and support to the same.

It is significant that there was no dissent in the court below as to the sufficiency of the evidence to support the verdict against Smith; that as to Curley, the majority of the court below stated that not only could a jury reasonably be convinced of his guilt beyond a reasonable doubt, but that they themselves were so convinced (App. 68); and that in summarizing the evidence as to

Curley, the dissenting judge neglected to consider Curley's own statements in the supplementary proceedings that he worked with the Group in the development of business, that he received $3,500 from the Group, and that he considered himself a stockholder in the Group, thus obviously expecting to share in any profits that might be made.

2. None of the other contentions urged by petitioners presents any question of merit.

(a) Petitioner Curley argues (Pet. 51–54) that his testimony in the supplementary proceedings (see Statement, *supra,* pp. 14–15) should have been admitted only to show business association with Fuller and not as evidence that he received money from the Group, despite the fact that he himself stated in those proceedings that the money was paid to him by the Group to meet "certain obligations." This extraordinary suggestion is predicated on the fact that the government's evidence does not disclose receipt of money from any victim by August 8, 1941, the date on which Curley received the $3,500. However, the testimony of the bookkeeper subsequently employed by the Group shows that the records were in a chaotic condition (R. 1417), and there might well have been funds not reflected in the records available to him. Furthermore, negotiations for contracts with persons referred by Curley were in progress in August 1941 (see Statement, *supra,* pp. 11–13), and it is not improbable that money

could have been borrowed in anticipation of expected fees. In any event, the Government was clearly entitled to take Curley's own statements as it found them. And since such statements were directly related to the issues at the trial, they were properly admitted in evidence for whatever they tended to prove.

(b) The contention of petitioner Smith that the court in its instructions did not follow the rule laid down by this Court in *Kotteakos* v. *United States,* 328 U. S. 750 (Pet. 14, 15, 22), is apparently based on the assumption that two separate conspiracies were proved—one to obtain fees for construction contracts and the other to obtain fees for conversion to war work. It is clear, however, that there was in fact only one conspiracy to defraud by representing the Engineers' Group as an organization in a position to obtain government contracts. It is true that Smith entered the conspiracy after it had been in existence for some time, and that the trial judge, properly holding that he could not be held responsible for the substantive offenses committed before his participation, directed an acquittal as to Smith on the counts which charged mailings prior to his entry into the conspiracy (R. 3143). But it is settled that one who joins a conspiracy after its inception is deemed to have adopted all that has gone before, and that evidence of prior acts by co-conspirators in furtherance of the conspiracy may be

offered against the latecomer as well as against his co-conspirators. *United States* v. *Manton*, 107 F. 2d 834, 848 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Marino* v. *United States*, 91 F. 2d 691, 696 (C. C. A. 9), certiorari denied *sub nom. Gullo* v. *United States*, 302 U. S. 764; *McDonald* v. *United States*, 89 F. 2d 128, 133 (C. C. A. 8); *Laska* v. *United States*, 82 F. 2d 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Baker* v. *United States*, 21 F. 2d 903, 905 (C. C. A. 4), certiorari denied, 276 U. S. 621; *Van Riper* v. *United States*, 13 F. 2d 961, 967 (C. C. A. 2), certiorari denied *sub nom. Ackerson* v. *United States*, 273 U. S. 702. It should also be noted that, in his requests to charge (R. 3842–3843), Smith did not ask for any instruction limiting the effect of any particular evidence.

(c) Finally, Smith contends (Pet. 14, 22) that the trial court committed reversible error in excluding documentary evidence which he offered after he had called witnesses in his own behalf, and after the evidence had been finally closed. The Court of Appeals stated that, since most of the documents had been identified on cross-examination of government witnesses and had been available to the government, their exclusion might have been considered reversible error if the substantial rights of Smith had been affected, but that, after examining each of the documents, the court had reached the conclusion that none of

them had any real bearing on the issue of Smith's good faith and hence that the exclusion did not operate to his prejudice (App. 69–71).

The circumstances under which the exhibits were offered and excluded appear at pp. 3328–3334 of the record. We think the Court of Appeals was unduly critical of the trial judge's action. The judge indicated that, if counsel had overlooked a few exhibits, he would give him an opportunity to offer them, but that he did not believe that, after the case had been closed, it was proper to offer a large mass of exhibits, the materiality and relevancy of which might well be questioned (R. 3328–3331). As we shall show below, the materiality and relevancy of many of the exhibits was in fact very questionable; indeed, a number of them were clearly inadmissible. It is significant that when Smith's counsel did seek to take advantage of the court's offer to admit a few exhibits, he offered in evidence an affidavit by Smith himself (R. 3332–3333). Under the circumstances, we do not believe that the trial judge abused his discretion in refusing to admit a mass of exhibits at that point.

In any event, the Court of Appeals was clearly correct in holding that the exclusion of the exhibits did not affect Smith's substantial rights. Many of the exhibits would have been inadmissible under any circumstances, and the others have no real bearing on the issue of Smith's good faith.

Exhibit 1 is a letter written by Smith on April 8, 1942, to the cashier of the Metropolitan Bank of Washington stating that he had learned that a check dated April 3, 1942, bearing his signature as treasurer of the Engineers' Group, Inc., had been given to the manager of Wilson's Mens Wear; that the check was a forgery; and that he had severed all connection with the Group on February 16, 1942. Since the letter and the transaction to which it related occurred after the Group had completely disintegrated, it is difficult to understand how the letter could have been deemed relevant or admissible.

Exhibit 2 was renumbered Government's Exhibit 163 and was admitted in evidence (R. 2703).

Exhibit 3 is an announcement of the resignation of Smith as treasurer and is a duplicate of Government's Exhibit 117, which was admitted in evidence at R. 1710.

Exhibit 4 is a letter to Fuller from one Dickman acknowledging receipt of the announcement; this letter was never identified (R. 714–715).

Exhibit 5 is a letter to Fuller from the Norcor Corporation, dated February 24, 1942, i. e., after Smith's resignation, which did not refer to Smith at all. Moreover, the major portions of the letter were quoted verbatim in cross-examination of the witness who identified it (R. 989–991).

Exhibits 6, 8, 9, and 10* are communications between the Forse Company and Fuller, which showed that Forse believed that Fuller was getting contracts for the company, and that Forse anticipating buying machinery to carry out the contract. None of these letters refer to Smith. The facts which the letters tended to prove were fully developed by the Government on direct (R. 1250–1251, 1257, 1259–1260, 1265–1268, 1269–1271, 1277) and by defense counsel on cross-examination of Forse (R. 1287–1296, 1304–1308). Furthermore, the substance of these exhibits was set forth in the testimony of the witness on cross-examination (R. 1327–1350).

Exhibit 11 is a letter written by Smith to John Hamilton, of the Forse Corporation, on June 11, 1943, showing that Smith was then trying to get business for the corporation. It obviously has no relevancy to Smith's conduct in the period from December 1941 to February 1942. Moreover, Forse testified that his company did have dealings with Smith as late as 1943, and that they had no complaint about his services (R. 1359).

Exhibits 12 and 14 are letters from the Hays Manufacturing Company to the Glenwood Range Company and the Forse Company, stating that Smith had referred to those companies as ones which had taken advantage of the services of Engineers' Group, Inc. to equip themselves to under-

* Exhibit 7 went into evidence as Gov. Ex. 98 (R. 1259).

take defense contracts "and that such contracts had been undertaken" and asking about the companies' experiences with the Group. Exhibit 13 is a reply to the Hays Company from the Glenwood Range Company, stating that Glenwood had no success at all with the Group, and that Fuller was a high pressure salesman. Obviously, this correspondence was not helpful to Smith. In fact, it shows that, contrary to the assertions in his brief, he did attempt to negotiate contracts in the name of the Group. Hays testified on direct examination that Smith told him that the Group had obtained contracts for either the Glenwood Range or Forse Company (R. 1449), and he testified further on cross-examination that Smith had given both those companies as references (R. 1457).

Exhibit 15 is a statement of deposits and payments by the Group from December 17, 1941, to February 13, 1942, prepared by the bookkeeper employed by the Group. The exhibit contains only the figures themselves, and those figures were taken from Gov. Ex. 108, which was introduced at R. 1418 (see R. 1487). The fact, which Smith stresses in his petition (Pet. 10–11), that he did not obtain a complete statement of this nature until February 1942, was brought out, not by the exhibit, but by the testimony of the bookkeeper on the stand (R. 1402, 1417–1418, 1481, 1482, 1485–1488). In this connection, however, Smith fails

to mention the other testimony that he was told the bank balance "practically daily" (R. 1408).

Exhibit 16 is a letter from DeLaney, of the Faultless Rubber Company, to Smith, dated July 17, 1941, about a proposed government contract. Since that date was about six months before Smith joined the Engineers' Group, it could prove only that DeLaney had prior dealings with Smith about government contracts, a fact to which DeLaney had already testified (R. 1509–1510, 1527–1529).

Exhibit 17 is merely a check dated January 20, 1942, for $1,500 made to the order of Williams and Englehardt. The letter referring to the enclosed check was introduced as Gov. Ex. 144 (R. 2168, 2172).

Exhibit 18 is a statement by Fuller dated February 16, 1942, containing a list of checks preceded by the following paragraph:

> This is to certify that I, James Fuller, as Executive Vice President of Engineers Group Inc. authorized and directed you, as treasurer of Engineers Group Inc. to issue the following checks at the time each of them was issued.

Conceivably, this statement might have been admissible against Fuller as a declaration against interest. But we do not know on what possible basis Smith would have had any right to introduce this hearsay declaration without any testimony by Fuller. The statement was obviously

not a record kept in the ordinary course of business nor an act in furtherance of the conspiracy.

Exhibit 19 consists of a group of letters from Anderson to Smith in the period from April 23 to August 2, 1942. They showed that Anderson had some dealings with Smith in that period, that he believed Smith "and a couple of the other boys do not deserve a deal of this sort," and that he warned Smith that witnesses were being called to testify before a grand jury. This was the only exhibit which the court below thought had any bearing on the issue of Smith's good faith. We submit, however, that these letters were clearly inadmissible. Anderson was not one of the witnesses who implicated Smith. In fact, he testified that he first met Smith in April or May of 1942, i. e., after the Group had disintegrated, and that he never received any communication from Smith about his contract with the Group (R. 2676). His letters merely expressed his opinion long after the event on the very issue which was before the jury for determination. Far from limiting Smith's right of cross-examination, the court erred in his favor by allowing the substance of one of these letters in evidence on cross-examination of Anderson by Smith's counsel (R. 2681–2682).

Exhibit 20 is an affidavit by Smith given to Anderson when the latter was trying to recover his deposit in April or May of 1942, long after

Smith had severed connection with the Group. It was clearly inadmissible as a self-serving declaration. The facts that Smith did give the affidavit and that he did try to help Anderson were established by the testimony of Anderson on cross-examination (R. 2684–2685).

Under all the circumstances, we submit that the trial court did not err in excluding this mass of exhibits offered on behalf of Smith.

## CONCLUSION

The ruling below in these cases is in accord with principles already enunciated by this Court. There is consequently no conflict of decision, and there is raised no other question meriting further review. We therefore respectfully submit that the petitions for writs of certiorari should be denied.

GEORGE T. WASHINGTON,
*Acting Solicitor General.*
THERON L. CAUDLE,
*Assistant Attorney General.*
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
*Attorneys.*

MAY 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947